

ARKANSAS CODE
OF 1987
ANNOTATED

OFFICIAL EDITION



VOLUME 2A • TITLE 4, CH. 1-24

ARKANSAS CODE OF 1987 ANNOTATED



VOLUME 2A 2001 Replacement

TITLE 4: BUSINESS AND COMMERCIAL LAW (CHAPTERS 1-24)

Prepared by the Editorial Staff of the Publisher

Under the Direction and Supervision of the
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4061611

ISBN: 0-327-16139-6



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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2001 Regular Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2001 Ark. Lexis 284 (May 3, 2001).

Federal Supplement through May 8, 2001.

Federal Reporter 3d Series through May 8, 2001.

United States Supreme Court Reports, through May 8, 2001.

Bankruptcy Reporter through May 8, 2001.

Arkansas Law Notes through the 1999 Edition.

Arkansas Law Review through Volume 53, No. 3, p. 749.

University of Arkansas at Little Rock Law Journal through Volume 23, No. 2, p. 540.

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| 15. Natural Resources and Economic Development | |

User's Guide

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

TITLE 4

BUSINESS AND COMMERCIAL LAW

(CHAPTERS 25-40 IN VOLUME 2B; CHAPTERS 41-108 IN
VOLUME 2C)

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SUBTITLE 1. UNIFORM COMMERCIAL CODE

A.C.R.C. Notes. The Arkansas General Assembly adopted the original Uniform Commercial Code by Acts 1961, No. 185. There have been numerous amendments to the Uniform Commercial Code by the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.) since the original enactment. A majority of these amendments have been adopted in Arkansas. The A.C.R.C. notes following the commentary sections in the Commentaries volume specify which amendments were adopted in Arkansas and also set out other variations between the Uniform Commercial Code and the Arkansas enactment of the Uniform Commercial Code.

The following list specifies by year the sections of the U.C.C. which were amended by the N.C.C.U.S.L. The year referred to is the date of the Uniform Commercial Code amendment by the National Conference of Commissioners on Uniform State Laws and not the year it was adopted in Arkansas. The date a particular amendment was adopted in Arkansas will be reflected by the history notes following the amended section.

1962:

4-3-105, 4-3-112, 4-3-122 [Repealed], 4-3-412, 4-3-504, 4-4-106, 4-4-109 (new section added to U.C.C. by N.C.C.U.S.L. in 1962), 4-4-204, 4-6-103 [Repealed], 4-6-104 [Repealed], 4-6-106 (amended by N.C.C.U.S.L. in 1962, but Arkansas reserved this section) [Repealed], 4-6-107 [Repealed], 4-6-108 [Repealed], 4-8-102, 4-8-107 (new section added to U.C.C. by N.C.C.U.S.L. in 1962), 4-8-208, 4-8-306, 4-8-308 [Repealed], 4-8-313 [Repealed], 4-8-320 (new section added to U.C.C. by N.C.C.U.S.L. in 1962) [Repealed], 4-9-206

1966:

4-1-209 (new section added to U.C.C. by N.C.C.U.S.L. in 1966), 4-2-702, 4-3-501, 4-7-209

1972:

4-1-105, 4-1-201, 4-2-107, 4-5-116

1973:

4-8-102

1977:

4-1-201, 4-5-114, 4-8-101, 4-8-102, 4-8-103, 4-8-104, 4-8-105, 4-8-106, 4-8-107, 4-8-108, 4-8-201, 4-8-202, 4-8-203, 4-8-204, 4-8-205, 4-8-206, 4-8-207, 4-8-208, 4-8-301, 4-8-302, 4-8-303, 4-8-304, 4-8-305, 4-8-306, 4-8-307, 4-8-308 [Repealed], 4-8-309 [Repealed], 4-8-310 [Repealed], 4-8-311 [Repealed], 4-8-312 [Repealed], 4-8-313 [Repealed], 4-8-314 [Repealed], 4-8-315 [Repealed], 4-8-316 [Repealed], 4-8-317 [Repealed], 4-8-318 [Repealed], 4-8-319 [Repealed], 4-8-320 [Repealed], 4-8-321 (new section added to U.C.C. by N.C.C.U.S.L. in 1977) [Repealed], 4-8-401, 4-8-402, 4-8-403, 4-8-404, 4-8-405, 4-8-406, 4-8-407 (new section added to U.C.C. by N.C.C.U.S.L. in 1977), 4-8-408 (new section added to U.C.C. by N.C.C.U.S.L. in 1977) [Repealed], 4-9-103, 4-9-105, 4-9-203, 4-9-302, 4-9-304, 4-9-305, 4-9-309, 4-9-312

1987:

Article 2A (new article created by N.C.C.U.S.L. in 1987).

1989:

4-1-105, 4-2-403, Article 4A (new article added to U.C.C. by N.C.C.U.S.L. in 1989), Article 6 (Article 6 totally revised by N.C.C.U.S.L. in 1989). Article 6 was repealed in Arkansas. The revised Article 6 has not been adopted.

1990:

4-1-201, 4-1-207, Article 3 (Article 3 rewritten by N.C.C.U.S.L. in 1990), 4-4-101 — 4-4-504 (Article 4 amended by N.C.C.U.S.L. in 1990 to conform to new Article 3).

1998:

Article 9 (revised by N.C.C.U.S.L. in 1998).

Publisher's Notes. Article 9, as revised in 1998, was adopted in Arkansas effective July 1, 2001, by Acts 2001, No. 1439.

RESEARCH REFERENCES

Ark. L. Rev. Commercial Code in Arkansas, 14 Ark. L. Rev. 302.

Problems of Sources of Law Relationships Under the Uniform Commercial

Code — Part I: The Methodological Problem and the Civil Law Approach, 31 Ark. L. Rev. 1.

UALR L.J. Murphey, Twenty Years Af-

ter: Reflections on the Uniform Commercial Code in Arkansas — Articles 3 and 4, 7 UALR L.J. 523.

CASE NOTES

Applicability.

Contract for excavation of a boot pit area for a rice dryer did not come within any category of transactions covered by this subtitle and provisions of the code would not govern admissibility of evidence in a suit under the contract. *Venturi, Inc. v. Adkisson*, 261 Ark. 855, 552 S.W.2d 643 (1977).

Cited: *Ouachita Indus., Inc. v. Anderson*, 236 Ark. 929, 370 S.W.2d 811 (1963); *Peek v. Bank of Star City*, 237 Ark. 967, 377 S.W.2d 158 (1964); *United States v. Baptist Golden Age Home*, 226 F. Supp.

892 (W.D. Ark. 1964); *United States Fid. & Guar. Co. v. Wells*, 246 Ark. 255, 437 S.W.2d 797 (1969); *City Nat'l Bank v. Vanderboom*, 290 F. Supp. 592 (W.D. Ark. 1968); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972), cert. denied, 410 U.S. 909, 93 S. Ct. 963, 35 L. Ed. 2d 270 (1973); *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 558 S.W.2d 147 (1977); *Wilkins v. M & H Fin., Inc.*, 476 F. Supp. 212 (E.D. Ark. 1979), aff'd, 621 F.2d 311 (8th Cir. 1980); *Mayhew v. Loveless*, 1 Ark. App. 69, 613 S.W.2d 118 (1981).

CHAPTER 1

GENERAL PROVISIONS

PART.

1. SHORT TITLE, CONSTRUCTION, APPLICATION, AND SUBJECT MATTER OF THE SUBTITLE.
2. GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

RESEARCH REFERENCES

Am. Jur. 15A *Am. Jur.* 2d, *Comm. Code*, § 1 et seq.

Ark. L. Rev. *Scope, Purposes and Func-*

tions of the Code: Article 1, 16 Ark. L. Rev. 1.

PART 1 — SHORT TITLE, CONSTRUCTION, APPLICATION, AND SUBJECT MATTER OF THE SUBTITLE

SECTION.

- 4-1-101. Short title.
- 4-1-102. Purposes — Rules of construction — Variation by agreement.
- 4-1-103. Supplementary general principles of law applicable.
- 4-1-104. Construction against implicit repeal.
- 4-1-105. Territorial application of the

SECTION.

- subtitle — Parties' power to choose applicable law.
- 4-1-106. Remedies to be liberally administered.
- 4-1-107. Waiver or renunciation of claim or right after breach.
- 4-1-108. Severability.
- 4-1-109. Section captions.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 1973, No. 116, § 6: Jan. 1, 1974.

Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article

9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

4-1-101. Short title.

This subtitle shall be known and may be cited as Uniform Commercial Code.

History. Acts 1961, No. 185, § 1-101; reen. 1967, No. 303, § 1 (1-101); A.S.A. 1947, § 85-1-101.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

CASE NOTES

Usury.

Uniform Commercial Code does not affect Arkansas law on usury. *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 364 S.W.2d 158 (1963).

Cited: *Myers v. Council Mfg. Corp.*, 276

F. Supp. 541 (W.D. Ark. 1967); *Beverage Prods. Corp. v. Robinson*, 27 Ark. App. 225, 769 S.W.2d 424 (1989); *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993).

4-1-102. Purposes — Rules of construction — Variation by agreement.

(1) This subtitle shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this subtitle are:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this subtitle may be varied by agreement, except as otherwise provided in this subtitle and except that the obligations of good faith, diligence, reasonableness and care prescribed by this subtitle may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this subtitle of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this subtitle, unless the context otherwise requires:

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

(6) Any notice required or authorized by this subtitle to be given by registered mail may be given by certified mail.

History. Acts 1961, No. 185, § 1-102;
reen. 1967, No. 303, § 1 (1-102); A.S.A.
1947, § 85-1-102.

CASE NOTES

Cited: Teeter Motor Co. v. First Nat'l
Bank, 260 Ark. 764, 543 S.W.2d 938
(1976).

4-1-103. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this subtitle, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

History. Acts 1961, No. 185, § 1-103;
reen. 1967, No. 303, § 1 (1-103); A.S.A.
1947, § 85-1-103.

CASE NOTES

ANALYSIS

Custom.
 Estoppel.
 Executions.

Custom.

While the Uniform Commercial Code apparently did not directly contemplate the use of money orders and made no specific provision for them, it is the custom and practice of the business community to accept personal money orders as a pledge of the issuing bank's credit so that a court may consider this custom and practice in construing the legal effect of such instruments. *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 621 S.W.2d 683 (1981).

Estoppel.

Buyer held to be prevented from assert-

ing defense of statute of frauds under § 4-2-201 because of the doctrine of promissory estoppel. *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 611 S.W.2d 201 (1981).

Executions.

The term "bill of debt" in the current execution statute, § 16-66-201(5), is meaningless because the law in this area is superseded by the provisions of this section. *In re Frazier*, 136 Bankr. 199 (Bankr. W.D. Ark. 1991).

Cited: *Pachter, Gold & Schaffer v. Yantis*, 742 F. Supp. 544 (W.D. Ark. 1990); *TB of Blytheville, Inc. v. Little Rock Sign & Emblem, Inc.*, 328 Ark. 688, 946 S.W.2d 930 (1997).

4-1-104. Construction against implicit repeal.

This subtitle being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

History. Acts 1961, No. 185, § 1-104; reen. 1967, No. 303, § 1 (1-104); A.S.A. 1947, § 85-1-104.

4-1-105. Territorial application of the subtitle — Parties' power to choose applicable law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this subtitle applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this subtitle specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 4-2-402.

Applicability of the chapter on leases. Sections 4-2A-105 and 4-2A-106.

Applicability of the chapter on bank deposits and collections. Section 4-4-102.

Governing law in the chapter on funds transfers. Section 4-4A-507.

Letters of Credit. Section 4-5-116.

Applicability of the chapter on Investment Securities. Section 4-8-110.

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. Sections 4-9-301 through 4-9-307.

History. Acts 1961, No. 185, § 1-105; reen. 1967, No. 303, § 1 (1-105); 1973, No. 116, § 2; A.S.A. 1947, § 85-1-105; Acts 1991, No. 344, § 2; 1991, No. 540, § 2; 1993, No. 439, § 2; 1995, No. 425, § 2; 1997, No. 1070, § 2; 2001, No. 1439, § 2.

A.C.R.C. Notes. Acts 1997, No. 1070, codified as § 4-5-118, provided: "This act applies to a letter of credit that is issued on or after the effective date of this act [August 1, 1997]. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act."

Publisher's Notes. Acts 1973, No. 116,

§ 1, amended or reenacted the provisions of Acts 1961, No. 185, Art. 9, as amended (former chapter 9 of this title).

Acts 1973, No. 116, § 5, provided that all transactions which were subject to the provisions of Acts 1961, No. 185, Art. 9, as amended (former chapter 9 of this title), and which were executed prior to January 1, 1974 would be governed by Acts 1961, No. 185, Art. 9, as amended and in effect prior to January 1, 1974.

Amendments. The 1997 amendment added "Letters of Credit. § 4-5-116" in (2).

The 2001 amendment rewrote the section.

RESEARCH REFERENCES

Ark. L. Rev. McDermott, Standard Leasing Corp. v. Schmidt Aviation: Analysis of Contract Choice of Law in Usury Cases, 34 Ark. L. Rev. 297.

Leflar, Conflict of Laws: Arkansas, 1978-82, 36 Ark. L. Rev. 191.

Leflar, Conflict of Laws: Arkansas, 1983-87, 41 Ark. L. Rev. 63.

UALR L.J. Arkansas Law Survey, Greene, Civil Procedure, 7 UALR L.J. 167.

Arkansas Law Survey, Nelson, Conflicts of Law, 7 UALR L.J. 173.

CASE NOTES

ANALYSIS

Agreements of the parties.
Conflict of laws.

Agreements of the Parties.

There is little difference, if any, between subsection (1) and Arkansas case law on usury regarding the test for determining when parties may agree that another state's law will govern an agreement. United States Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 576 F.2d 153 (8th Cir. 1978).

It was clear that the intent of the parties was that the note be governed by the laws of Mississippi. Wilkins v. M & H Fin., Inc., 476 F. Supp. 212 (E.D. Ark. 1979), aff'd, 621 F.2d 311 (8th Cir. 1980).

The parties agreeing in their lease

agreement that the lease would be governed by and construed under the laws of Arkansas does not give an Arkansas court personal jurisdiction in and of itself, it does provide another contact with this state which goes to satisfy the minimum contacts requirement. SD Leasing, Inc. v. Al Spain & Assocs., 277 Ark. 178, 640 S.W.2d 451 (1982).

Where contract for purchase of machinery directly involved four states, the agreement that the law of the state where finance company was located would be the governing law was not unreasonable and was not a subterfuge to avoid Arkansas usury laws. Snow v. C.I.T. Corp. of S., Inc., 278 Ark. 554, 647 S.W.2d 465 (1983).

Parties chose to apply Texas law, and transaction bore a reasonable relation to

Texas. Arkansas Appliance Distrib. Co. v. Tandy Elecs., Inc., 292 Ark. 482, 730 S.W.2d 899 (1987).

A retail installment contract was valid, notwithstanding that it expressly stated that an interest rate of 18 percent per annum was to be charged, where the contract was assigned to a Texas entity and the contract stated that Texas law was to apply. *Evans v. Harry Robinson Pontiac-Buick, Inc.*, 336 Ark. 155, 983 S.W.2d 946 (1999).

Conflict of Laws.

Where the contract was made in Arkansas and provided that the time balance was payable in Arkansas and no other place of payment was ever designated, the fact that by indorsement the contract was assigned to a Tennessee bank did not take the transaction out of the provisions of the law of Arkansas and under Arkansas law the finance charge constituted usury although not under Tennessee law. *Lyles v. Union Planters Nat'l Bank*, 239 Ark. 738, 393 S.W.2d 867 (1965).

Where plaintiffs were residents of Arkansas, the injuries and damages sustained occurred in Arkansas, the suit was filed in Arkansas, and some of the cattle were delivered by defendants or their agents to plaintiffs in Arkansas, and, pursuant to § 2-40-101, Arkansas has a state interest in preventing the bringing of diseased cattle into the state warranting finding that transactions in question bear an appropriate relation to the state, the application of the law of Arkansas to suit for breach of implied and express warranties and sale of diseased cattle where cattle were negotiated for and purchased in Missouri from Missouri defendants was proper. *Threlkeld v. Worsham*, 30 Ark. App. 251, 785 S.W.2d 249 (1990).

Cited: *McMillen v. Winona Nat'l & Sav. Bank*, 279 Ark. 16, 648 S.W.2d 460 (1983); *Leonard v. Merchants & Farmers Bank*, 290 Ark. 571, 720 S.W.2d 908 (1986); *Porterco, Inc. v. Igloo Prods. Corp.*, 955 F.2d 1164 (8th Cir. 1992); *Klipsch, Inc. v. WWR Technology, Inc.*, 127 F.3d 729 (8th Cir. 1997).

4-1-106. Remedies to be liberally administered.

(1) The remedies provided by this subtitle shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this subtitle or by other rule of law.

(2) Any right or obligation declared by this subtitle is enforceable by action unless the provision declaring it specifies a different and limited effect.

History. Acts 1961, No. 185, § 1-106; reen. 1967, No. 303, § 1 (1-106); A.S.A. 1947, § 85-1-106.

RESEARCH REFERENCES

Ark. L. Notes. Flaccus, Update: Repossession and Sale under Arkansas' Article Nine, etc., 1987 Ark. L. Notes 90.

UALR L.J. White, The Decline of the Contract Market Damage Model, 11 UALR L.J. 1.

CASE NOTES

Cited: *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972); *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976); *Capital Steel Co. v. Foster & Creighton*

Co., 264 Ark. 683, 574 S.W.2d 256 (1978); *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982); *Gordon v. Planters & Merchants Bankshares, Inc.*, 326 Ark. 1046, 935 S.W.2d 544 (1996).

4-1-107. Waiver or renunciation of claim or right after breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

History. Acts 1961, No. 185, § 1-107; reen. 1967, No. 303, § 1 (1-107); A.S.A. 1947, § 85-1-107.

4-1-108. Severability.

If any provision or clause of this subtitle or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the subtitle which can be given effect without the invalid provision or application, and to this end the provisions of this subtitle are declared to be severable.

History. Acts 1961, No. 185, § 1-108 as added by 1967, No. 303, § 1 (1-108).

4-1-109. Section captions.

Section captions are parts of this subtitle.

History. Acts 1961, No. 185, § 1-109; as added by 1967, No. 303, § 1 (1-109); A.S.A. 1947, § 85-1-110.

PART 2 — GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

SECTION.

- 4-1-201. General definitions.
- 4-1-202. Prima facie evidence by third party documents.
- 4-1-203. Obligation of good faith.
- 4-1-204. Time — Reasonable time — “Seasonably”.
- 4-1-205. Course of dealing and usage of trade.

SECTION.

- 4-1-206. Statute of frauds for kinds of personal property not otherwise covered.
- 4-1-207. Performance or acceptance under reservation of rights.
- 4-1-208. Option to accelerate at will.
- 4-1-209. Subordinated obligations.

Publisher’s Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 1973, No. 116, § 6: Jan. 1, 1974.

Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: “It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new

categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert

and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing

that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Business Law, 1 UALR L.J. 118.

Tyler, Survey of Business Law, 3 UALR L.J. 149.

4-1-201. General definitions.

Subject to additional definitions contained in the subsequent chapters of this subtitle which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this subtitle:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity, and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this subtitle (§§ 4-1-205, 4-2-208). Whether an agreement has legal consequences is determined by the provisions of this subtitle, if applicable; otherwise by law of contracts (§ 4-1-103). (Compare "contract".)

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or

customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under chapter 2 may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this subtitle and any other applicable rules of law. (Compare "agreement".)

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission, or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this subtitle to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder" with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations.

(25) A person has "notice" of a fact when:

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this subtitle.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when:

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this subtitle.

(30) "Person" includes an individual or an organization (see § 4-1-102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift, or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to chapter 9. The special property interest of a buyer of goods on identification of those goods to a contract for sale under § 4-2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with chapter 9. Except as otherwise provided in § 4-2-505, the right of a seller or lessor of goods under chapter 2 or chapter 2A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with chapter 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§ 4-2-401) is limited in effect to a reservation of a "security interest".

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has to effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Terms" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature means one made without actual, implied, or apparent authority and includes a forgery.

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (§§ 4-3-303, 4-4-210, and 4-4-211) a person gives "value" for rights if he acquires them:

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a preexisting claim; or

(c) by accepting delivery pursuant to a preexisting contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(46) "Written" or "writing" includes printing, typewriting, or any other intentional reduction to tangible form.

History. Acts 1961, No. 185, § 1-201; 1967, No. 303, § 2 (1-201); 1973, No. 116, § 2; 1985, No. 514, § 1; A.S.A. 1947, § 85-1-201; Acts 1991, No. 572, §§ 1-3; 1993, No. 439, § 3; 2001, No. 1439, § 3.

Publisher's Notes. Acts 1973, No. 116, § 1, amended or reenacted the provisions of Acts 1961, No. 185, Art. 9, as amended (former chapter 9 of this title).

Acts 1973, No. 116, § 5, provided that

all transactions which were subject to the provisions of Acts 1961, No. 185, Art. 9, as amended (former chapter 9 of this title), and which were executed prior to January 1, 1974 would be governed by Acts 1961, No. 185, Art. 9, as amended and in effect prior to January 1, 1974.

Amendments. The 2001 amendment rewrote (9), (32), and (37).

RESEARCH REFERENCES

Ark. L. Notes. Copeland, A Statutory Primer: Article 2 of the U.C.C., — When Do Its Rules Apply?, 1990 Ark. L. Notes 39.

Laurence, Bona Fide Purchaser Analysis, Beverage Products Corporation v. Robinson and the Case Against Very Short Opinions, 1990 Ark. Law Notes 85.

Ark. L. Rev. Note. Conditional Sales Contracts, True Leases, and the Lessee's Right to Terminate, 43 Ark. L. Rev. 899.

UALR L.J. Adams, "Clear Title" for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

CASE NOTES

ANALYSIS

Buyer in the ordinary course of business.
Conspicuousness.
Delivery.

Good faith.
Good faith purchasers for value.
Notice.
Purchasers.
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Send.
Value.

Buyer in the Ordinary Course of Business.

"Buying" does not include a transaction in which the person claiming to be a "buyer in ordinary course of business" merely acts as an agent for another, such as an auctioneer. *Commercial Bank v. Hales*, 281 Ark. 439, 665 S.W.2d 857 (1984).

Buyer was not buyer in ordinary course of business. *Merchants & Planters Bank & Trust Co. v. Phoenix Hous. Sys.*, 21 Ark. App. 153, 729 S.W.2d 433 (1987).

Conspicuousness.

The requirement that an exclusion or modification of implied warranties be conspicuous is to ensure that attention of the buyer can reasonably be expected to be brought to it. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Disclaimer attempting to exclude or modify implied warranties was ineffective as a matter of law where it was in the body of the instrument and in the same size and color of type as other provisions. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Express warranty which was actually in the nature of a disclaimer of all other warranties which did not mention merchantability and which first appeared inside an operation and maintenance manual which was not supplied until after delivery of the equipment in question was invalid as not mentioning merchantability and as not being conspicuous. *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969).

Where documents involved were before Supreme Court on appeal, Supreme Court was in a position to determine whether express warranty which purported to be in lieu of all others was conspicuous. *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969).

A disclaimer of warranty which, though in italics, was in smaller and lighter type than other portions of the contract failed

to meet the statutory requirement of conspicuousness. *DeLemar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970).

Where a disclaimer of express and implied warranties was located among much small type on the back of a tractor sales agreement, and the disclaimer was not set out in brackets or readily identifiable in any other manner, the disclaimer was not conspicuous and was therefore ineffective. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Where the manufacturer's disclaimer appeared on the back of the dealer's purchase order, but in print larger than the surrounding writing, and writing in large print on the front of the form, directly above the line for the buyer's signature, directed the buyer to the controlling terms on the back, the writing was such that should have attracted the attention of a reasonable buyer and, therefore, satisfied the standard for conspicuousness. *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299 (8th Cir. 1986).

Whether disclaimers are conspicuous is a factual determination, requiring not only the submission of labels and pamphlets, but also submission of information concerning the placement of the labels on containers, and representations made to the buyers. *Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991).

Delivery.

Where an instrument is no longer in possession of a party whose signature is on it, there is a presumption of delivery. *Bryan v. Bartlett*, 435 F.2d 28 (8th Cir. 1970), cert. denied, 402 U.S. 915, 91 S. Ct. 1373, 28 L. Ed. 2d 658 (1971).

The distributor failed to present evidence sufficient to set out a claim for violation of good faith performance by the oil company when it introduced a cap on its rebate program, where the distributor did not produce evidence of the pricing or rebate practices of other oil companies nor did it present evidence of retailer-wholesaler price margins, price rebates, or ceilings on price rebates. *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986).

Good Faith.

Corporation held to be lacking in good faith so as to bar its enforcement of secu-

urity agreement. *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969).

The fact that every contract imposes an obligation to act in good faith does not create a cause of action for a violation of that obligation. *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 966 S.W.2d 894 (1998).

Good Faith Purchasers for Value.

Bank held to be good faith purchaser for value, under subdivisions (19), (33), and (44), of bonds fraudulently appropriated by debtor and pledged to bank as collateral. *First Am. Nat'l Bank v. Christian Found. Life Ins. Co.*, 242 Ark. 678, 420 S.W.2d 912 (1967).

The defendant did not breach the warranty of title, notwithstanding that a car he sold to the plaintiff was confiscated as a stolen vehicle, since he was a good faith purchaser where (1) the defendant purchased the car from a third party who, before he purchased the car, contacted the licensing agency and was informed that the car's title was good, and (2) the third party related this information to the defendant before the defendant purchased the car. *Midway Auto Sales, Inc. v. Clarkson*, 71 Ark. App. 316, 29 S.W.3d 788 (2000).

Notice.

Filing in real estate records does not constitute notice as to personal property, and actual knowledge is required under this subtitle. *In re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965).

Notice held to be sufficient. *Warren Co. v. Neel*, 284 F. Supp. 203 (W.D. Ark. 1968), aff'd, *Kimbell Milling Co. v. Warren Co.*, 406 F.2d 775 (8th Cir. 1969); *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), overruled on other grounds by *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

The knowledge by the government required to subordinate a government tax lien to an improperly filed security interest is actual knowledge or reason to have such actual knowledge. *United States v. Ed Lusk Constr. Co.*, 504 F.2d 328 (10th Cir. 1974).

Notice mailed to debtor at his home was adequate where it was received by his wife even though he never saw it. *Clark v. First Nat'l Bank*, 24 Ark. App. 52, 748 S.W.2d 42 (1988).

For breach of warranty, no particular form of notice to the seller is required, and the notice need not be in writing. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), aff'd sub nom. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

Where material questions of fact remained regarding issue of whether defendant was given notice of its breach of warranty, defendant was not entitled to summary judgment on that issue. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), aff'd sub nom. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

Purchasers.

An auctioneer is merely a selling agent, not a "purchaser." *Commercial Bank v. Hales*, 281 Ark. 439, 665 S.W.2d 857 (1984).

Evidence held sufficient to show plaintiff was a purchaser for value. *J.M. Prods., Inc. v. Arkansas Capital Corp.*, 51 Ark. App. 85, 910 S.W.2d 702 (1995).

Security Interest.

Under subdivision (37), the question of whether a lease of personal property is a conditional sale contract depends on the intent of the parties and inclusion of an option to purchase does not of itself make a sale contract. *In re Shell*, 390 F. Supp. 273 (E.D. Ark. 1975).

Lease with option to buy held to be security interest. *Capital Typewriter Co. v. Davidson*, 390 F. Supp. 273 (E.D. Ark. 1975); *General Elec. Credit Corp. v. Bankers Com. Corp.*, 244 Ark. 984, 429 S.W.2d 60 (1968).

Factors which distinguish a lease from a secured transaction include: (1) whether the financing agent is also a manufacturer or dealer; (2) whether a down payment is required; (3) whether the lessee must bear the risk of loss; (4) whether the lessee has an option to purchase at the end of the lease term and, if so, whether the purchase may be for little or no additional consideration; (5) whether the lessor, upon the lessee's default under the lease, has a right to declare all lease payments due and payable (similar to a mortgagee's foreclosure rights); (6) whether the lessee must pay sales taxes; (7) whether financing statements or additional security instruments are completed regarding the transaction; and (8) whether a sales price for the purchase was established at the

outset of the lease. Thus agreement was not a lease, but a conditional sales contract and a secured transaction, where the agreement provided for a down payment at the start of the "lease", the weekly payments included sales tax of approximately the current Arkansas sales tax rate, all risk of loss fell upon the "lessee", the "lessee" was expressly provided an option to purchase which could be exercised only at a specific time, and, in the lease, the purchase price for the option was established at the outset, which precluded consideration of the actual fair market value of the television at the end of the term. In re Brown, 82 Bankr. 68 (Bankr. W.D. Ark. 1987).

A transaction would be construed as a sale and security interest as a matter of law where there was no agreement that the debtor could terminate the lease and the debtor became the owner of the trailer at issue at the end of the lease term for the sum of one dollar. In re Macklin, 236 Bankr. 403 (E.D. Ark. 1999).

The statute does not require a finding as a matter of law that a transaction is a true lease based only on the fact that the lessee may terminate the lease at any time. In re Copeland, 238 Bankr. 801 (E.D. Ark. 1999).

A transaction by the debtor involving a portable warehouse was a lease, rather than a sale subject to a security interest, where the debtor invested little in the transaction at its inception and the supplier of the portable warehouse assumed the risk that the "sale" would be lost if the debtor terminated the lease, notwithstanding that the transaction involved a relatively small sum of money and after only a brief period, the debtor's investment in the building would make it economically foolish to terminate the lease. In re Copeland, 238 Bankr. 801 (E.D. Ark. 1999).

Send.

The deposit of returned checks in the mail by midnight complies with the requirement that the checks be "sent" to the bank's transferor. Union Nat'l Bank v. Metropolitan Nat'l Bank, 265 Ark. 340, 578 S.W.2d 220 (1979).

Value.

Promise to extend credit in return for security agreement was value given.

Putnam Realty, Inc. v. Terminal Moving & Storage Co., 631 F.2d 547 (8th Cir. 1980).

Cited: United States v. Baptist Golden Age Home, 226 F. Supp. 892 (W.D. Ark. 1964); Nicklaus v. Peoples Bank & Trust Co., 258 F. Supp. 482 (E.D. Ark. 1965); Commercial Credit Corp. v. Associates Dist. Corp., 246 Ark. 118, 436 S.W.2d 809 (1969); Bailey v. Ford Motor Co., 246 Ark. 950, 440 S.W.2d 238 (1969); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Starkey Constr., Inc. v. Elcon, Inc., 248 Ark. 958, 457 S.W.2d 509 (1970); Pine Bluff Prod. Credit Ass'n v. Lloyd, 252 Ark. 682, 480 S.W.2d 578 (1972); Planters' Prod. Credit Ass'n v. Bowles, 256 Ark. 1063, 511 S.W.2d 645 (1974); Pine Bluff Nat'l Bank v. Kesterson, 257 Ark. 813, 520 S.W.2d 253 (1975); Rex Fin. Corp. v. Marshall, 406 F. Supp. 567 (W.D. Ark. 1976); McMillan v. Meuser Material & Equip. Co., 260 Ark. 422, 541 S.W.2d 911 (1976); Bell v. Itek Leasing Corp., 262 Ark. 22, 555 S.W.2d 1 (1977); Walker Ford Sales v. Gaither, 265 Ark. 275, 578 S.W.2d 23 (1979); Swink & Co. v. Carroll McEntee & McGinley, Inc., 266 Ark. 279, 584 S.W.2d 393 (1979); Findley Mach. Co. v. Miller, 3 Ark. App. 264, 625 S.W.2d 542 (1981); Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487 (W.D. Ark. 1982); Rhodes v. Oaklawn Bank, 279 Ark. 51, 648 S.W.2d 470 (1983); Steele v. Murphy, 279 Ark. 235, 650 S.W.2d 573 (1983); Worthen Bank & Trust Co. v. Hilyard Drilling Co., 60 Bankr. 500 (Bankr. W.D. Ark. 1986); Mooney v. Grant County Bank, 18 Ark. App. 224, 711 S.W.2d 841 (1986); Farmers Rice Milling Co. v. Hawkins (In re Bearhouse, Inc.), 84 Bankr. 552 (Bankr. W.D. Ark. 1988); Hazen First State Bank v. Speight, 888 F.2d 574 (8th Cir. 1989); Niedermeier v. Central Prod. Credit Ass'n, 300 Ark. 116, 777 S.W.2d 210 (1989); Adams v. First State Bank, 300 Ark. 235, 778 S.W.2d 611 (1989); Reynolds v. Commodity Credit Corp., 300 Ark. 441, 780 S.W.2d 15 (1989); Miller v. First Nat'l Bank, 29 Ark. App. 247, 780 S.W.2d 589 (1989); In re Taylor, 130 Bankr. 849 (Bankr. E.D. Ark. 1991); Galatia Community State Bank v. Kindy, 307 Ark. 467, 821 S.W.2d 765 (1991); Rice v. Fas Fax Corp. (In re Hot Shots Burgers & Fries, Inc.), 183 Bankr. 848 (Bankr. E.D. Ark. 1995); J.M. Prods., Inc. v. Arkansas Capital Corp., 51 Ark. App. 85, 910 S.W.2d 702 (1995); Affiliated Foods S.W., Inc. v.

Moran, 322 Ark. 808, 912 S.W.2d 8 (1995);
Long v. Lampton, 324 Ark. 511, 922
S.W.2d 692 (1996).

4-1-202. Prima facie evidence by third party documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

History. Acts 1961, No. 185, § 1-201
[1-202]; reen. 1967, No. 303, § 2 (1-202);
A.S.A. 1947, § 85-1-202.

4-1-203. Obligation of good faith.

Every contract or duty within this subtitle imposes an obligation of good faith in its performance or enforcement.

History. Acts 1961, No. 185, § 1-203;
reen. 1967, No. 303, § 2 (1-203); A.S.A.
1947, § 85-1-203.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Gordon v. Bank's Wrongful Charge-Back, 51 Ark. L. Planters & Merchants Bancshares: Punitive Damages May Be Awarded For Rev. 611.

CASE NOTES

ANALYSIS

Applicability.
Bad faith.
Breach.
Contractual terms.
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Good faith.
Punitive damages.

Applicability.

Failure to exercise good faith under this section raises the issue of breach of contract but is not present in a case where the only contract at issue between the parties is a promissory note. *Affiliated Foods S.W., Inc. v. Moran*, 322 Ark. 808, 912 S.W.2d 8 (1995).

Bad Faith.

This section permits the consideration

of the lack of good faith of party who first perfected security interest toward the second lienholder to alter priorities which otherwise would be determined under chapter 9 of this title. *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969).

Bank had had a clear duty under § 4-4-215 to refrain from charging-back a check against customer's account once payment had become final; the Bank's breach of this duty could have been construed to be an exercise of bad faith strictly prohibited by this section. *Gordon v. Planters & Merchants Bankshares, Inc.*, 326 Ark. 1046, 935 S.W.2d 544 (1996).

Breach.

To establish a breach of the obligation of good faith, the plaintiff must demonstrate that the defendant was not honest in fact and that he acted with a bad motive.

Southern Implement Co. v. Deere & Co., 122 F.3d 503 (8th Cir. 1997).

Contractual Terms.

The UCC good faith provision may not be used to override explicit contractual terms. *Frank Lyon Co. v. Maytag Corp.*, 715 F. Supp. 922 (E.D. Ark. 1989).

Demand Loans.

In the face of a demand note, there is no lack of good faith defense available, much less an action in tort for bad faith; a bank is entitled to terminate the loan for any reason or for no reason and it cannot be held liable for refusing to extend when it has no obligation to do so. *Zeno Buick-GMC, Inc. v. GMC Truck & Coach*, 844 F. Supp. 1340 (E.D. Ark. 1992), *aff'd*, 9 F.3d 115 (8th Cir. 1993).

Good Faith.

The Uniform Commercial Code places a general obligation of good faith on the parties to a contract. *Ripplemeyer v. National Grape Coop. Ass'n*, 807 F. Supp. 1439 (W.D. Ark. 1992).

Whether or not agreements are governed by the Uniform Commercial Code, it appears that there is an implied covenant of good faith and fair dealing; a breach of

this implied covenant would constitute a breach of contract. *Ripplemeyer v. National Grape Coop. Ass'n*, 807 F. Supp. 1439 (W.D. Ark. 1992).

The fact that every contract imposes an obligation to act in good faith does not create a cause of action for a violation of that obligation. *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 966 S.W.2d 894 (1998).

Punitive Damages.

Punitive damages can be awarded for bad faith Article 4 violations, where the statute does not specifically prohibit them, without the necessity that an alternative, common law tort be pled. *Gordon v. Planters & Merchants Bankshares, Inc.*, 326 Ark. 1046, 935 S.W.2d 544 (1996).

Cited: *Farmers Equip. Co. v. Miller*, 252 Ark. 1092, 482 S.W.2d 805 (1972); *Sullins v. Thrift Plan, Inc.*, 255 Ark. 655, 501 S.W.2d 781 (1973); *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 60 Bankr. 500 (Bankr. W.D. Ark. 1986); *Tradax Am., Inc. v. First Nat'l Bank (In re Howell Enters., Inc.)*, 105 Bankr. 494 (Bankr. E.D. Ark. 1989); *Adams v. First State Bank*, 300 Ark. 235, 778 S.W.2d 611 (1989).

4-1-204. Time — Reasonable time — “Seasonably”.

(1) Whenever this subtitle requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken “seasonably” when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

History. Acts 1961, No. 185, § 1-204; reen. 1967, No. 303, § 2 (1-204); A.S.A. 1947, § 85-1-204.

CASE NOTES

ANALYSIS

Reasonable time.
Revocation of acceptance.

Reasonable Time.

The plain meaning of subsection (1)

shows that if the Arkansas legislature wants an action to be taken in a reasonable time, they express it within the text of the statute, as they have done repeatedly throughout the Uniform Commercial Code. *Landreth v. First Nat'l Bank*, 45 F.3d 267 (8th Cir. 1995).

Revocation of Acceptance.

Whether revocation of acceptance of nonconforming goods was given within a reasonable time was a question of fact. *Frontier Mobile Home Sales, Inc. v. Tringleth*, 256 Ark. 101, 505 S.W.2d 516 (1974).

The time for revocation of acceptance was reasonable. *Hughes v. Brown*, 1 Ark. App. 171, 613 S.W.2d 848 (1981).

Revocation of acceptance held to be within a reasonable time after nonconformity of goods was discovered. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Cited: *Dopieralla v. Arkansas La. Gas Co.*, 255 Ark. 150, 499 S.W.2d 610 (1973); *McKay Properties, Inc. v. Alexander & Assocs.*, 63 Ark. App. 24, 971 S.W.2d 284 (1998).

4-1-205. Course of dealing and usage of trade.

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

History. Acts 1961, No. 185, § 1-205; 1967, No. 303, § 2 (1-205); A.S.A. 1947, § 85-1-205.

RESEARCH REFERENCES

Ark. L. Rev. Uniform Commercial Code — Course of Dealing and Usage of Trade, 20 Ark. L. Rev. 388.

UALR L.J. Adams, "Clear Title" for

Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

CASE NOTES

ANALYSIS

Course of dealing.

Trade usages.

Course of Dealing.

Previous small contracts could not form the basis for a jury determination as to a "course of dealing" as to a large contract. *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978).

Evidence did not establish a course of dealing which would apply to disclaimer provisions in purchase agreement. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Trade Usages.

Where the evidence did not indicate that the buyer was the type of party who

was or should be aware of the industry's trade customs, since it was entering a market in which it was relying on seller's expertise, the district court was not clearly erroneous in finding seller's implied warranties were not effectively disclaimed. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Cited: *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 60 Bankr. 500 (Bankr. W.D. Ark. 1986); *Hazen First State Bank v. Speight*, 888 F.2d 574 (8th Cir. 1989); *Precision Steel Whse., Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993); *Trucker's Exch., Inc. v. Border City Foods, Inc.*, 67 Ark. App. 231, 998 S.W.2d 434 (1999).

4-1-206. Statute of frauds for kinds of personal property not otherwise covered.

(1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars (\$5,000) in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (§ 4-2-201) nor of securities (§ 4-8-113) nor to security agreements (§ 4-9-203).

History. Acts 1961, No. 185, § 1-206; reen. 1967, No. 303, § 2 (1-206); A.S.A. 1947, § 85-1-206; Acts 1995, No. 425, § 3.

RESEARCH REFERENCES

ALR. Construction and application of § 1-206 governing personal property not statute-of-frauds provision under UCC otherwise covered. 62 ALR 5th 137.

CASE NOTES

Parol Evidence.

Parol evidence was admitted to aid in determination of what the contract meant, for even though part of the sales contract was oral and thus in violation of

this section, the conditions of this section were met by the bill of sale entered into between the parties. *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359 (8th Cir. 1985).

4-1-207. Performance or acceptance under reservation of rights.

(1) A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “without prejudice”, “under protest” or the like are sufficient.

(2) Subsection (1) does not apply to an accord and satisfaction.

History. Acts 1961, No. 185, § 1-207; reen. 1967, No. 303, § 2 (1-207); A.S.A. 1947, § 85-1-207; Acts 1991, No. 572, § 4.

RESEARCH REFERENCES

UALR L.J. Arkansas Law Survey, Harper, Business Law, 7 UALR L.J. 159.

CASE NOTES

ANALYSIS

Applicability.

Accord and satisfaction.

Applicability.

This section is only applicable to transactions falling under the provisions of the Uniform Commercial Code. Peek Planting

Co. v. W. H. Kennedy & Sons, 257 Ark. 669, 519 S.W.2d 49 (1975).

Accord and Satisfaction.

This section has not altered the common-law rule of accord and satisfaction. Pillow v. Thermogas Co., 6 Ark. App. 402, 644 S.W.2d 292 (1982).

4-1-208. Option to accelerate at will.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral “at will” or “when he deems himself insecure” or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

History. Acts 1961, No. 185, § 1-208; reen. 1967, No. 303, § 2 (1-208); A.S.A. 1947, § 85-1-208.

RESEARCH REFERENCES

ALR. What constitutes “good faith” under UCC § 1-208 dealing with “insecure” or “at will” acceleration clauses. 85 ALR 4th 284.

Ark. L. Rev. “Mortgages — A Catalogue and Critique on the Role of Equity on the Enforcement of Modern-Day ‘Due-on-Sale’

Clauses,” 26 Ark. L. Rev. 485.

Note, Bowen v. Danna: Application of Uniform Commercial Code Section 1-208 to Acceleration Clauses in Real Property Transfers, 36 Ark. L. Rev. 643.

UALR L.J. Survey of Arkansas: Business Law, 6 UALR L.J. 73.

CASE NOTES

ANALYSIS

Applicability.
Due-on-sale clauses.
Exercise of option.
Good faith.
Waiver.

Applicability.

This section is inapplicable where the right to accelerate is conditional upon the occurrence of an event, such as a lapse of required insurance coverage, which is in the complete control of the debtor. *Bowen v. Danna*, 276 Ark. 528, 637 S.W.2d 560 (1982).

Due-on-Sale Clauses.

Even though the sale by the mortgagor of the mortgaged premises to a third party was the occurrence of an event exclusively within the control of the mortgagor, the creditor bank was subject to the good faith requirement of this section before accelerating the debt under a due-on-sale clause, because a state court decision restricted the enforceability of due-on-sale clauses to instances where the creditor proved a legitimate security ground for refusing to accept the transfer of title to a third party had become a rule of property in this state, at least for loans made prior to the effective date of 12 U.S.C. § 1701j-3 which eliminates restrictions on enforcement of due-on-sale clauses in real property loans. *Abrego v. United Peoples Fed. Sav. & Loan Ass'n*, 281 Ark. 308, 664 S.W.2d 858 (1984).

Exercise of Option.

Where the mortgagors are at fault for not paying and the mortgagees for giving them some reason to believe acceleration would not occur, the mortgagors should be given a reasonable time to make the overdue payments. *Rawhide Farms, Inc. v. Darby*, 267 Ark. 776, 589 S.W.2d 210 (1979).

Where there was no evidence of inequitable conduct, and there was a breach by the promisors of their repayment obligation on promissory note secured by mortgages, the promisees were entitled to exercise the acceleration clause. *Westlund v. Melson*, 7 Ark. App. 268, 647 S.W.2d 488 (1983).

Good Faith.

The good faith requirement of this section was not applicable where the promissory note did not provide that the holder could accelerate it at will or when he deemed himself insecure but instead provided that the holder could only accelerate it upon default by the debtor in making the payments or in keeping the premises insured or in paying the taxes. *Bowen v. Danna*, 276 Ark. 528, 637 S.W.2d 560 (1982).

Where a conditional sales agreement contained a default type acceleration clause rather than one providing for "acceleration at will," the trial court erred in applying the good faith requirements set forth in this section. *Hickmon v. Beene*, 6 Ark. App. 272, 640 S.W.2d 812 (1982).

The good faith requirement for acceleration does not apply to clauses which permit the acceleration of a debt upon the default of a specific condition which is in the exclusive control of the debtor. *Abrego v. United Peoples Fed. Sav. & Loan Ass'n*, 281 Ark. 308, 664 S.W.2d 858 (1984).

The good faith requirement of this section is applicable to clauses which place exclusive control in the creditor; however, should the acceleration clause provide for default upon occurrence of an event exclusively within the control of the debtor, then the creditor cannot bring about the occurrence of that specific event and there is no need for the protection by the good faith requirement of this section. *Abrego v. United Peoples Fed. Sav. & Loan Ass'n*, 281 Ark. 308, 664 S.W.2d 858 (1984).

The UCC good faith provision may not be used to override explicit contractual terms. *Frank Lyon Co. v. Maytag Corp.*, 715 F. Supp. 922 (E.D. Ark. 1989).

Waiver.

Although acceptance of a late payment precludes acceleration because of the lateness of that payment, it is not a waiver of the right to accelerate when default occurs on a subsequent installment. *Rawhide Farms, Inc. v. Darby*, 267 Ark. 776, 589 S.W.2d 210 (1979); *Westlund v. Melson*, 7 Ark. App. 268, 647 S.W.2d 488 (1983).

Cited: *Seay v. Davis*, 246 Ark. 201, 438 S.W.2d 479 (1969); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 252 Ark. 849, 481 S.W.2d 725 (1972).

4-1-209. Subordinated obligations.

An obligation may be issued as subordinated to payment of another obligation of the person obligated, or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it.

History. Acts 1961, No. 185, § 1-209, as added by 1967, No. 303, § 2 (1-209); A.S.A. 1947, § 85-1-209.

CHAPTER 2

SALES

PART.

1. SHORT TITLE, GENERAL CONSTRUCTION, AND SUBJECT MATTER.
2. FORM, FORMATION, AND READJUSTMENT OF CONTRACT.
3. GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT.
4. TITLE, CREDITORS, AND GOOD FAITH PURCHASERS.
5. PERFORMANCE.
6. BREACH, REPUDIATION, AND EXCUSE.
7. REMEDIES.

RESEARCH REFERENCES

ALR. Sales under Article 2, generally. 4 ALR 4th 85.

Pre-emption of strict liability in tort by provisions of UCC Article 2. 15 ALR 4th 791.

Computer sales and leases, time when cause of action for failure of performance accrues. 90 ALR 4th 298.

Ark. L. Rev. Sales: Article II, 16 Ark. L. Rev. 6.

Comments: The "Battle" of Contract Formation Under the UCC — Win, Lose or Draw?, Chaney. 32 Ark. L. Rev. 528.

Leflar, Conflict of Laws: Arkansas, 1983-87, 41 Ark. L. Rev. 63.

UALR L.J. Flaccus, The Lemon and Its Rejection: Code Language and Its Misconstruction, 9 UALR L.J. 303.

CASE NOTES

Cited: Equipment Supply Co. v. Smith, 255 Ark. 678, 502 S.W.2d 467 (1973); Unlaub Co. v. Sexton, 568 F.2d 72 (8th Cir. 1977); Jacob Hartz Seed Co. v. Coleman,

271 Ark. 756, 612 S.W.2d 91 (1981); Watson v. Miears, 612 F. Supp. 1235 (W.D. Ark. 1984); Watson v. Miears, 772 F.2d 433 (8th Cir. 1985).

PART 1 — SHORT TITLE, GENERAL CONSTRUCTION, AND SUBJECT MATTER

SECTION.

- 4-2-101. Short title.
 4-2-102. Scope — Certain security and other transactions excluded from chapter.
 4-2-103. Definitions and index of definitions.
 4-2-104. Definitions — “Merchant” — “Between merchants” — “Financing agency”.
 4-2-105. Definitions — Transferability — “Goods” — “Future” goods

SECTION.

- “Lot” — “Commercial unit”.
 4-2-106. Definitions — “Contract” — “Agreement” — “Contract for sale” — “Sale” — “Present sale” — “Confirming” to contract — “Termination” — “Cancellation”.
 4-2-107. Goods to be severed from realty — Recording.

Publisher’s Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 1973, No. 116, § 6: Jan. 1, 1974.

Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: “It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article

9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001.”

RESEARCH REFERENCES

ALR. Applicability of UCC Article 2 to mixed contracts for sale of goods and services. 5 ALR 4th 501.

Am. Jur. 67 Am. Jur. 2d, Sales, § 1 et seq.

Ark. L. Notes. Copeland, A Statutory Primer: Article 2 of the U.C.C. — When Do Its Rules Apply?, 1990 Ark. L. Notes 39.

4-2-101. Short title.

This chapter shall be known and may be cited as Uniform Commercial Code — Sales.

History. Acts 1961, No. 185, § 2-101; 1967, No. 303, § 3; A.S.A. 1947, § 85-2-101.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

4-2-102. Scope — Certain security and other transactions excluded from chapter.

Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

History. Acts 1961, No. 185, § 2-102; A.S.A. 1947, § 85-2-102.

CASE NOTES

Contract for Services.

Since this section limits the application of § 4-2-210 to contracts involving the sale of goods, § 4-2-210(4) was not applicable to contract between general contractor and subcontractor for plumbing work. *Newton v. Merchants & Farmers Bank*, 11 Ark. App. 167, 668 S.W.2d 51 (1984).

Where the series of agreements at issue was not predominantly for the sale of goods, but was rather for services and the

use of a trademark, the Uniform Commercial Code (as enacted by Arkansas) did not apply. *JRT Inc. v. TCBY Sys.*, 52 F.3d 734 (8th Cir. 1995).

Cited: *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W.2d 46 (1968); *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. 1977); *Walt Bennett Ford, Inc. v. Dyer*, 4 Ark. App. 354, 631 S.W.2d 312 (1982); *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923 (8th Cir. 1999).

4-2-103. Definitions and index of definitions.

- (1) In this chapter unless the context otherwise requires:
 - (a) "Buyer" means a person who buys or contracts to buy goods.
 - (b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

- (c) "Receipt" of goods means taking physical possession of them.

- (d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

"Acceptance". Section 4-2-606.

"Banker's credit". Section 4-2-325.

"Between merchants". Section 4-2-104.

"Cancellation". Section 4-2-106(4).

"Commercial unit". Section 4-2-105.

"Confirmed credit". Section 4-2-325.

"Conforming to contract". Section 4-2-106.

"Contract for sale". Section 4-2-106.

"Cover". Section 4-2-712.

"Entrusting". Section 4-2-403.

"Financing agency". Section 4-2-104.

"Future goods". Section 4-2-105.

"Goods". Section 4-2-105.

"Identification". Section 4-2-501.

"Installment contract". Section 4-2-612.

"Letter of credit". Section 4-2-325.

"Lot". Section 4-2-105.

"Merchant". Section 4-2-104.

"Overseas". Section 4-2-323.

"Person in position of seller". Section 4-2-707.

"Present sale". Section 4-2-106.

"Sale". Section 4-2-106.

"Sale on approval". Section 4-2-326.

"Sale or return". Section 4-2-326.

"Termination". Section 4-2-106.

(3) The following definitions in other chapters apply to this chapter:

"Check". Section 4-3-104.

"Consignee". Section 4-7-102.

"Consignor". Section 4-7-102.

"Consumer goods". Section 4-9-102.

"Dishonor". Section 4-3-502.

"Draft". Section 4-3-104.

(4) In addition, chapter 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History. Acts 1961, No. 185, § 2-103; A.S.A. 1947, § 85-2-103; 2001, No. 1439, § 4.

Amendments. The 2001 amendment substituted "§ 4-3-502" for "§ 4-3-507" in (3).

RESEARCH REFERENCES

Ark. L. Rev. McDermott, Standard Leasing Corp. v. Schmidt Aviation: Analysis of Contract Choice of Law in Usury Cases, 34 Ark. L. Rev. 297.

UALR L.J. Adams, "Clear Title" for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

CASE NOTES

Good Faith.

The distributor failed to present evidence sufficient to set out a claim for violation of good faith performance by the oil company when it introduced a cap on its rebate program, where the distributor did not produce evidence of the pricing or rebate practices of other oil companies nor did it present evidence of retailer-wholesaler price margins, price rebates, or ceilings on price rebates. Richard Short Oil

Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986).

The UCC good faith provision may not be used to override explicit contractual terms. Frank Lyon Co. v. Maytag Corp., 715 F. Supp. 922 (E.D. Ark. 1989).

Cited: Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487 (W.D. Ark. 1982).

4-2-104. Definitions — “Merchant” — “Between merchants” — “Financing agency”.

(1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) “Financing agency” means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. “Financing agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (§ 4-2-707).

(3) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

History. Acts 1961, No. 185, § 2-104;
A.S.A. 1947, § 85-2-104.

RESEARCH REFERENCES

UALR L.J. Adams, “Clear Title” for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

CASE NOTES

Merchant.

Where appellee was a farmer and nothing else he was not a “merchant” as the term is used in the Uniform Commercial

Code. *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965).

Cited: *Cargill, Inc. v. Weston*, 520 F.2d 669 (8th Cir. 1975).

4-2-105. Definitions — Transferability — “Goods” — “Future” goods — “Lot” — “Commercial unit”.

(1) “Goods” means all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 8 of this title) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 4-2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are

“future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller’s interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) “Lot” means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

History. Acts 1961, No. 185, § 2-105;
A.S.A. 1947, § 85-2-105.

RESEARCH REFERENCES

Ark. L. Notes. Looney, *The Toothless Cow, the Little Bull That Couldn’t, and Udder Matters: Livestock Warranties and* the Uniform Commercial Code, 1990 Ark. L. Notes 75.

CASE NOTES

Commercial Unit.

Forty-pound carton of frozen chicken constituted a commercial unit because division of the product did not materially impair its character or value on the market or in use. *Grand State Mktg. v. Eastern Poultry Distribs.*, 63 Ark. App. 123, 975 S.W.2d 439 (1998).

Cited: *Robertson v. Ceola*, 255 Ark. 703, 501 S.W.2d 764 (1973); *In re Estate of*

Spann, 257 Ark. 857, 520 S.W.2d 286 (1975); *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. 1977); *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980); *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 611 S.W.2d 201 (1981); *Walt Bennett Ford, Inc. v. Dyer*, 4 Ark. App. 354, 631 S.W.2d 312 (1982); *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359 (8th Cir. 1985).

4-2-106. Definitions — “Contract” — “Agreement” — “Contract for sale” — “Sale” — “Present sale” — “Conforming” to contract — “Termination” — “Cancellation”.

(1) In this chapter unless the context otherwise requires “contract” and “agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (§ 4-2-401). A

“present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

History. Acts 1961, No. 185, § 2-106;
A.S.A. 1947, § 85-2-106.

CASE NOTES

ANALYSIS

Present sale.
Sale.

Present Sale.

Contract which stated, “The undersigned seller of the grain indicated on this contract fully understands that he or she is transferring title of said grain to the buyer and is relinquishing all control of the grain to the buyer” was an explicit agreement by the parties that title would pass at the time the contract was executed rather than at delivery of the crops. *Cullipher v. Lindsey Rice Mill, Inc.*, 730 F. Supp. 970 (W.D. Ark. 1990).

Sale.

Unless transfer of title of grain from the producer to the warehouseman has occurred, the grain is to be regarded as stored rather than sold. *Tucker v.*

Durham, 285 Ark. 264, 686 S.W.2d 402 (1985).

Cited: *American Aviation, Inc. v. Aviation Ins. Managers, Inc.*, 244 Ark. 829, 427 S.W.2d 544 (1968); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972); *Southland Mobile Home Corp. v. Chyrchel*, 255 Ark. 366, 500 S.W.2d 778 (1973); *In re Estate of Spann*, 257 Ark. 857, 520 S.W.2d 286 (1975); *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. 1977); *Pemberton v. Arkansas State Hwy. Comm’n*, 268 Ark. 929, 597 S.W.2d 605 (1980); *Midland Dev., Inc. v. Pine Truss, Inc.*, 24 Ark. App. 132, 750 S.W.2d 62 (1988); *Farmers Rice Milling Co. v. Hawkins (In re Bearhouse, Inc.)*, 84 Bankr. 552 (Bankr. W.D. Ark. 1988); *Barton v. United States, Farmers Home Admin.*, 132 Bankr. 23 (Bankr. W.D. Ark. 1991).

4-2-107. Goods to be severed from realty — Recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without

material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land, and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

History. Acts 1961, No. 185, § 2-107; 1973, No. 116, § 3; A.S.A. 1947, § 85-2-107.

Publisher's Notes. Acts 1973, No. 116, § 1, amended or reenacted the provisions of Acts 1961, No. 185, Art. 9, as amended (former chapter 9 of this title).

Acts 1973, No. 116, § 5, provided that

all transactions which were subject to the provisions of Acts 1961, No. 185, Art. 9, as amended (former chapter 9 of this title), and which were executed prior to January 1, 1974, would be governed by Acts 1961, No. 185, Art. 9, as amended and in effect prior to January 1, 1974.

CASE NOTES

ANALYSIS

Mineral interests.
Timber sales.

Mineral Interests.

Errors in earlier decree regarding royalties and conveyance of mineral interests, which decree was not appealed, could not be relitigated or corrected by subsequent purchasers of those mineral interests. *Phelps v. Justiss Oil Co.*, 291 Ark. 538, 726 S.W.2d 662 (1987).

Timber Sales.

The UCC is made applicable to timber sales by this section. *Davis v. Kolb*, 263 Ark. 158, 563 S.W.2d 438 (1978).

Cited: *In re Estate of Spann*, 257 Ark. 857, 520 S.W.2d 286 (1975); *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980); *Williams v. J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982); *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359 (8th Cir. 1985).

PART 2 — FORM, FORMATION, AND READJUSTMENT OF CONTRACT

SECTION.

- 4-2-201. Formal requirements — Statute of frauds.
- 4-2-202. Final written expression — Parol or extrinsic evidence.
- 4-2-203. Seals inoperative.
- 4-2-204. Formation in general.
- 4-2-205. Firm offers.
- 4-2-206. Offer and acceptance in formation of contract.

SECTION.

- 4-2-207. Additional terms in acceptance or confirmation.
- 4-2-208. Course of performance or practical construction.
- 4-2-209. Modification, rescission, and waiver.
- 4-2-210. Delegation of performance — Assignment of rights.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439,

§ 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code

which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of

the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

ALR. Conditional acceptance: Conversion to rejection and counteroffer under UCC § 2-207(1). 22 ALR 4th 939.

Promissory estoppel as basis for avoidance of UCC statute of frauds (UCC § 2-201). 29 ALR 4th 1006.

"Specially manufactured goods" statute of frauds exception in UCC § 2-101(3)(a). 45 ALR 4th 1126.

Am. Jur. 67 Am. Jur. 2d, Sales, § 102 et seq.

4-2-201. Formal requirements — Statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars (\$500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (§ 4-2-606).

History. Acts 1961, No. 185, § 2-201; A.S.A. 1947, § 85-2-201.

RESEARCH REFERENCES

ALR. Construction of statute of frauds exception under UCC § 2-201(2) for confirmatory writing between merchants. 82 ALR 4th 709.

CASE NOTES

ANALYSIS

Applicability.
Defenses.
Promissory estoppel.

Applicability.

Oral agreement between real estate broker and builder whereby builder was to pay broker commission of five percent for any building contracts which broker might obtain for builder was not a contract for sale of goods so as to fall within the provisions of this section. *Brown v. Lee*, 242 Ark. 122, 412 S.W.2d 273 (1967).

The statute of frauds does not apply to contracts which may be completely performed on one side when nothing remains to be done during a period longer than one year, except for the payment of compensation. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

Since this section applies only to contracts for the sale of goods, where tiles to be installed were obtained by tile setter, contract was not for "sale of goods" but was primarily a personal service contract and thus this section was inapplicable. *Robertson v. Ceola*, 255 Ark. 703, 501 S.W.2d 764 (1973).

Where lessee paid lessor after sales contract was executed and lessor accepted payment, the contract was taken out of the statute of frauds. *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359 (8th Cir. 1985).

Under Arkansas law a farmer is not a merchant, and since the Uniform Com-

mercial Code specifically provides that a confirmation is valid only between merchants, it would not apply to take the contract out of the statute of frauds where the confirmation is between a farmer and a merchant. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Defenses.

A defense founded upon the statute of frauds cannot be raised for the first time on appeal. *McMillan Feeder Fin. Corp. v. Stephens*, 240 Ark. 167, 398 S.W.2d 535 (1966).

Promissory Estoppel.

Buyer was prevented from asserting defense of statute of frauds because of the doctrine of promissory estoppel. *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 611 S.W.2d 201 (1981).

Because the UCC states that the principles of law and equity, including estoppel, supplement the code unless displaced by a particular provision, the doctrine of promissory estoppel may be asserted by one party to an oral contract for the sale of goods, to prevent the other party from asserting the defense of the statute of frauds. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Cited: *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965); *Cargill, Inc. v. Weston*, 520 F.2d 669 (8th Cir. 1975); *Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359 (8th Cir. 1985).

4-2-202. Final written expression — Parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade (§ 4-1-205) or by course of performance (§ 4-2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

History. Acts 1961, No. 185, § 2-202;
A.S.A. 1947, § 85-2-202.

RESEARCH REFERENCES

UALR L.J. Adams, "Clear Title" for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

CASE NOTES

ANALYSIS

Admissibility of parol evidence.
Finality of agreement.
Integrated agreements.

Admissibility of Parol Evidence.

Under this section the parol evidence rule is not changed and such evidence is inadmissible to vary the terms of a written conditional sales contract. *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

The trial court erred when it admitted the oral testimony of an automobile buyer to the effect that the seller's salesman had represented to the buyer that the sales tax on the automobile had already been paid, because that testimony varied the terms of the written sales contract and violated the parol evidence rule. *Walt Bennett Ford, Inc. v. Dyer*, 4 Ark. App. 354, 631 S.W.2d 312 (1982).

The Arkansas parol evidence rule does not bar the admission of oral testimony offered to explain the ambiguity and show the parties' intent, but it does bar the admission of oral testimony that contradicts or varies the written terms. *Bone v. Refco, Inc.*, 774 F.2d 235 (8th Cir. 1985).

Finality of Agreement.

This section does not prevent buyer of

farm equipment from testifying that such agreement was not intended to be final. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

The seller's oral express warranty of capacity for a system was not contradictory to terms in a written manual, where statements in the manual expressed only a theoretical range of capacity for the system, and where there was no evidence that indicated the parties intended the manual to be a final expression of their agreement. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Integrated Agreements.

When an integrated agreement exists, the Arkansas parol evidence rule bars the introduction into evidence of any prior agreement to contradict the terms of the agreement; however, a completely integrated agreement does not discharge prior agreements that do not fall within its scope, and a partially integrated agreement does not discharge prior agreements that supplement, but are not inconsistent with, the integrated agreement. *Bone v. Refco, Inc.*, 774 F.2d 235 (8th Cir. 1985).

Cited: *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W.2d 46 (1968); *Precision Steel Whse., Inc. v. Anderson-Mar-*

tin Mach. Co., 313 Ark. 258, 854 S.W.2d 321 (1993).

4-2-203. Seals inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

History. Acts 1961, No. 185, § 2-203; A.S.A. 1947, § 85-2-203.

4-2-204. Formation in general.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one (1) or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

History. Acts 1961, No. 185, § 2-204; A.S.A. 1947, § 85-2-204.

4-2-205. Firm offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three (3) months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

History. Acts 1961, No. 185, § 2-205; A.S.A. 1947, § 85-2-205.

4-2-206. Offer and acceptance in formation of contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances:

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the

buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

History. Acts 1961, No. 185, § 2-206;
A.S.A. 1947, § 85-2-206.

4-2-207. Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this subtitle.

History. Acts 1961, No. 185, § 2-207;
A.S.A. 1947, § 85-2-207.

CASE NOTES

Cited: Home Ice Co. v. Big "R" Ice Co.,
41 Ark. App. 192, 850 S.W.2d 333 (1993).

4-2-208. Course of performance or practical construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (§ 4-1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

History. Acts 1961, No. 185, § 2-208;
A.S.A. 1947, § 85-2-208.

RESEARCH REFERENCES

UALR L.J. Adams, "Clear Title" for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

CASE NOTES

Standard Warranty.

Unilateral attempt to insert warranty into transaction long after the purchase and delivery was ineffective and negated any evidence which indicated the parties may have been under the assumption the

standard warranty applied to the transaction. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Cited: *B.G. Coney Co. v. Radford Petro. Equip. Co.*, 287 Ark. 108, 696 S.W.2d 745 (1985).

4-2-209. Modification, rescission, and waiver.

(1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this chapter (§ 4-2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

History. Acts 1961, No. 185, § 2-209;
A.S.A. 1947, § 85-2-209.

CASE NOTES

Cited: *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254 (8th Cir. 1977).

4-2-210. Delegation of performance — Assignment of rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Except as otherwise provided in § 4-9-406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(4) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(6) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (§ 4-2-609).

History. Acts 1961, No. 185, § 2-210;
A.S.A. 1947, § 85-2-210; 2001, No. 1439,
§ 5.

Amendments. The 2001 amendment
rewrote the section.

CASE NOTES

ANALYSIS

Applicability.

Assignment.

Applicability.

Since § 4-2-102 limits the application of this section to contracts involving the sale of goods, subsection (4) of this section was not applicable to contract between general contractor and subcontractor for plumbing work. *Newton v. Merchants & Farmers Bank*, 11 Ark. App. 167, 668 S.W.2d 51 (1984).

Assignment.

An assignment is essentially a delegation of the performance of the duties of an assignor to another who, by its acceptance, promises to perform those duties; this promise is enforceable by either the assignor or the other party to the original agreement. *Pemberton v. Arkansas State Hwy. Comm'n*, 268 Ark. 929, 597 S.W.2d 605 (1980).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

PART 3 — GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

SECTION.

- 4-2-301. General obligation of parties.
- 4-2-302. Unconscionable contract or clause.
- 4-2-303. Allocation or division of risks.
- 4-2-304. Price payable in money, goods, realty, or otherwise.
- 4-2-305. Open price term.
- 4-2-306. Output, requirements, and exclusive dealings.
- 4-2-307. Delivery in single lot or several lots.
- 4-2-308. Absence of specified place for delivery.
- 4-2-309. Absence of specific time provisions — Notice of termination.
- 4-2-310. Open time for payment or running of credit — Authority to ship under reservation.
- 4-2-311. Options and cooperation respecting performance.
- 4-2-312. Warranty of title and against infringements — Buyer's obligation against infringement.
- 4-2-313. Express warranties by affirmation, promise, description, sample.

SECTION.

- 4-2-314. Implied warranty — Merchantability — Usage of trade.
- 4-2-315. Implied warranty — Fitness for particular purpose.
- 4-2-316. Exclusion or modification of warranties.
- 4-2-317. Cumulation and conflict of warranties express or implied.
- 4-2-318. Third party beneficiaries of warranties express or implied.
- 4-2-319. F.O.B. and F.A.S. terms.
- 4-2-320. C.I.F. and C. & F. terms.
- 4-2-321. C.I.F. or C. & F. — "Net landed weights" — "Payment on arrival" — Warranty of condition on arrival.
- 4-2-322. Delivery "ex-ship".
- 4-2-323. Form of bill of lading required in overseas shipment — "Overseas".
- 4-2-324. "No arrival, no sale" term.
- 4-2-325. "Letter of credit" term — "Confirmed credit".
- 4-2-326. Sale on approval and sale or return — Rights of creditors.
- 4-2-327. Special incidents of sale on approval and sale or return.
- 4-2-328. Sale by auction.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present

Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting

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example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

ALR. Output contracts under § 2-306(1) of Uniform Commercial Code. 30 ALR 4th 396.

Unconscionability of disclaimer of warranties or limitation or exclusion of damages, under UCC § 2-302 or § 2-719(3), in contract subject to UCC Article 2. 38 ALR 4th 25.

Auction sales under UCC § 2-328. 44 ALR 4th 110.

Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a). 47 ALR 4th 200.

Value of trade-in taken on sale of collateral for purposes of computing surplus or deficiency. 72 ALR 4th 1128.

Third-party beneficiaries of warranties under UCC § 2-318. 50 ALR 5th 327.

Am. Jur. 67 Am. Jur. 2d, Sales, § 102 et seq.

67A Am. Jur. 2d, Sales, § 690 et seq.

Ark. L. Rev. The Return of Caveat Vendor as the Law of Products Liability, 23 Ark. L. Rev. 355.

Legislative Note — Act 462 of 1973: Three Day "Cooling-Off" Period for Home Solicitation Sales, 27 Ark. L. Rev. 571.

4-2-301. General obligation of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

History. Acts 1961, No. 185, § 2-301; A.S.A. 1947, § 85-2-301.

CASE NOTES

Cited: Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Russ, 70 Ark. App. 23, 13 S.W.3d 920 (2000); Smith v.

4-2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

History. Acts 1961, No. 185, § 2-302; A.S.A. 1947, § 85-2-302.

RESEARCH REFERENCES

Ark. L. Notes. Copeland, The Implied Warranty of Habitability and the Use of the Uniform Commercial Code by Analogy, 1983 Ark. L. Notes 5.

Ark. L. Rev. Unconscionable Contracts and the Uniform Commercial Code, 20 Ark. L. Rev. 165.

Unconscionable Contracts: A New Approach for the Arkansas Lawyer, 21 Ark. L. Rev. 427.

UALR L.J. Pasvogel, Mortgage Substitutes — The Law in Arkansas, 9 UALR L.J. 433.

CASE NOTES

ANALYSIS

Contract unconscionable.
Evidence.
Futures contracts.
Misrepresentations.

Contract Unconscionable.

A finding of unconscionability was not clearly erroneous where: the agreement was a preprinted form; the provision relating to loss of future revenues was harsh in its operation; the contract was signed at a time when the defendant was already in default under its terms; and there appeared to be a substantial disparity in the relative bargaining power of the parties. *Associated Press v. Southern Ark. Radio Co.*, 34 Ark. App. 211, 809 S.W.2d 695 (1991).

Evidence.

The issue of unconscionability is one requiring factual development and determination. *Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991).

Futures Contracts.

Contracts for sale of cotton to be raised in the future were not unconscionable because the price for cotton was much higher when the time came to sell the crop, since the contracts were to be reviewed as of the time made and at that time there was no way of knowing that prices would go up. *J.L. McEntire & Sons v. Hart Cotton Co.*, 256 Ark. 937, 511 S.W.2d 179 (1974).

Misrepresentations.

A contract providing for the sale of timber would not be enforced where the first party misrepresented his experience and knowledge as a timber buyer to the second party, and where the party who was going to cut and remove the timber misrepresented the value of the timber to the other party. *Davis v. Kolb*, 263 Ark. 158, 563 S.W.2d 438 (1978).

Cited: *Sears, Roebuck & Co. v. Pettit*, 18 Bankr. 8 (Bankr. E.D. Ark. 1981).

4-2-303. Allocation or division of risks.

Where this chapter allocates a risk or a burden as between the parties "unless otherwise agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

History. Acts 1961, No. 185, § 2-303; A.S.A. 1947, § 85-2-303.

4-2-304. Price payable in money, goods, realty, or otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this chapter, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

History. Acts 1961, No. 185, § 2-304;
A.S.A. 1947, § 85-2-304.

4-2-305. Open price term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

(a) nothing is said as to price; or
(b) the price is left to be agreed by the parties and they fail to agree;
or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

History. Acts 1961, No. 185, § 2-305;
A.S.A. 1947, § 85-2-305.

CASE NOTES**Good Faith.**

The oil company did not act in bad faith when it introduced the cap on its rebate program, where its posted price, offered to all its distributors nationwide, satisfied subsection (2) of this section, and the distributor was free to buy from others if

the oil company would not match prices offered by these other sellers, while the oil company was bound to fill the distributor's requirements whenever it so demanded. *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986).

4-2-306. Output, requirements, and exclusive dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

History. Acts 1961, No. 185, § 2-306;
A.S.A. 1947, § 85-2-306.

CASE NOTES**Good Faith.**

The fact that the exclusive purchase agreement left open the number of gallons of gasoline to be purchased monthly did not support invalidation of the agreement, since this section imposed the duty on the buyer to conduct his business in good faith

so that his requirements would approximate a reasonably foreseeable figure. *Stacks v. F & S Petro. Co.*, 6 Ark. App. 327, 641 S.W.2d 726 (1982).

Cited: *Rocka v. Gipson*, 3 Ark. App. 293, 625 S.W.2d 558 (1981).

4-2-307. Delivery in single lot or several lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

History. Acts 1961, No. 185, § 2-307;
A.S.A. 1947, § 85-2-307.

4-2-308. Absence of specified place for delivery.

Unless otherwise agreed:

(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

History. Acts 1961, No. 185, § 2-308;
A.S.A. 1947, § 85-2-308.

4-2-309. Absence of specific time provisions — Notice of termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one (1) party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

History. Acts 1961, No. 185, § 2-309;
A.S.A. 1947, § 85-2-309.

CASE NOTES

Cited: *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972); *F & S Petro. Co., 6 Ark. App. 327, 641 S.W.2d 726* (1982); *Stacks v.*

4-2-310. Open time for payment or running of credit — Authority to ship under reservation.

Unless otherwise agreed:

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (§ 4-2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

History. Acts 1961, No. 185, § 2-310;
A.S.A. 1947, § 85-2-310.

4-2-311. Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (§ 4-2-204(3)) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties.

Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except otherwise provided in § 4-2-319(1)(c) and (3) specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

History. Acts 1961, No. 185, § 2-311;
A.S.A. 1947, § 85-2-311.

4-2-312. Warranty of title and against infringements — Buyer's obligation against infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

History. Acts 1961, No. 185, § 2-312;
A.S.A. 1947, § 85-2-312.

RESEARCH REFERENCES

Ark. L. Rev. For Whom the Bell Tolls — Future Performance Warranties, 28 Ark. L. Rev. 312.
An Interpretation of the UCC's Exception as to Accrual of a Cause of Action for

CASE NOTES

ANALYSIS

Good faith purchaser.

Holding oneself out to be owner.

Good Faith Purchaser.

The defendant did not breach the warranty of title, notwithstanding that a car he sold to the plaintiff was confiscated as a stolen vehicle, since he was a good faith purchaser where (1) the defendant purchased the car from a third party who, before he purchased the car, contacted the licensing agency and was informed that the car's title was good, and (2) the third party related this information to the defendant before the defendant purchased the car. *Midway Auto Sales, Inc. v. Clarkson*, 71 Ark. App. 316, 29 S.W.3d 788 (2000).

Holding Oneself Out to Be Owner.

Where the defendant held himself out as the owner of cattle to the buyer and participated in the negotiations, even though the actual owner was present at the sale, when it was subsequently discovered that a lien existed against the cattle, the defendant was liable for a breach of warranty. *Fields v. Sugar*, 251 Ark. 1062, 476 S.W.2d 814 (1972).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980); *United States v. Rorex*, 737 F.2d 753 (8th Cir. 1984); *Smith v. Russ*, 70 Ark. App. 23, 13 S.W.3d 920 (2000).

4-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

History. Acts 1961, No. 185, § 2-313; A.S.A. 1947, § 85-2-313.

RESEARCH REFERENCES

Ark. L. Notes. Looney, The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and the Uniform Commercial Code, 1990 Ark. L. Notes 75.

Ark. L. Rev. The Legal Kaleidoscope — Products Liability, 21 Ark. L. Rev. 301.

For Whom the Bell Tolls — An Interpretation of the UCC's Exception as to Accrual of a Cause of Action for Future

Performance Warranties, 28 Ark. L. Rev. 312.

Magnuson-Moss vs. State Protective

Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection, 30 Ark. L. Rev. 21.

CASE NOTES

ANALYSIS

Advertisements.

Affirmations of fact.

Information required by law.

Waiver.

Advertisements.

Where defendant's literature stated that two-ply of its roofing material were equivalent to four-ply of conventional material, that buyers could be "assured of greater quality, weather protection and long life," and that it was "bonded for up to 20 years" it could not be said as a matter of law that no express warranty had been made. *Little Rock Sch. Dist. v. Celotex Corp.*, 264 Ark. 757, 574 S.W.2d 669 (1978).

Affirmations of Fact.

Statement that weed killer had a 90-100% effectiveness became a part of "the basis of the bargain" and thus was an express warranty. *Chemco Indus. Applicators Co. v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973).

An affirmation of fact must be part of the basis of the parties' bargain to be an express warranty, so that when a buyer is not influenced by the statement in making his or her purchase, the statement is not a basis of the bargain. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

The evidence before the trial court sup-

ported the conclusion that statements by the defendant's agents that the defendant's herbicide was safe and would not injure a corn crop were affirmations of fact and not mere opinions, commendations, or "sales puffing", and constituted specific express warranties that the goods would conform to the affirmations. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

Information Required by Law.

Where state law requires a certificate on cotton seed sold for planting which will show the true percentage of germination, such certificate constitutes an express warranty as to the germination percentage stated. *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 95, 436 S.W.2d 820 (1969).

Waiver.

Buyer's exercise of ownership over car following an initial attempt to return it did not constitute a waiver of breach of warranty claims where seller refused to allow revocation. *Currier v. Spencer*, 299 Ark. 182, 772 S.W.2d 309 (1989).

Cited: *Pearrow v. Huntsman*, 248 Ark. 1146, 455 S.W.2d 128 (1970); *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980); *DeLuryea v. Winthrop Lab., Div. of Sterling Drug, Inc.*, 697 F.2d 222 (8th Cir. 1983); *Watson v. Miears*, 772 F.2d 433 (8th Cir. 1985); *Shaver v. Spann*, 35 Ark. App. 118, 813 S.W.2d 280 (1991).

4-2-314. Implied warranty — Merchantability — Usage of trade.

(1) Unless excluded or modified (§ 4-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§ 4-2-316), other implied warranties may arise from course of dealing or usage of trade.

History. Acts 1961, No. 185, § 2-314; A.S.A. 1947, § 85-2-314.

RESEARCH REFERENCES

Ark. L. Notes. Copeland, The Implied Warranty of Habitability and the Use of the Uniform Commercial Code by Analogy, 1983 Ark. L. Notes 5.

Looney, The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and the Uniform Commercial Code, 1990 Ark. L. Notes 75.

Ark. L. Rev. The Return of Caveat Vendor as the Law of Products Liability, 23 Ark. L. Rev. 355.

Legislative Note — Act 111 of 1973: An Act to Impose Liability for Injury and Damages Done in Certain Circumstances by Defective Products, 27 Ark. L. Rev. 562.

For Whom the Bell Tolls — An Interpretation of the UCC's Exception as to Accrual of a Cause of Action for Future

Performance Warranties, 28 Ark. L. Rev. 312.

The Personal Injury Action in Warranty — Has the Arkansas Strict Liability Statute Rendered It Obsolete? 28 Ark. L. Rev. 335.

Voucher to Products Liability: The Mechanics of U.C.C. § 2-607(5)(a), 29 Ark. L. Rev. 486.

Magnuson-Moss v. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection, 30 Ark. L. Rev. 21.

Note, Liability of Builder-Vendor: Blagg v. Fred Hunt Co., 35 Ark. L. Rev. 654 (1982).

UALR L.J. Arkansas Law Survey, Roberts and Deere, Torts, 8 UALR L.J. 207.

CASE NOTES

ANALYSIS

Applicability.

Breach.

Fit for ordinary purposes.

Fitness for use.

Merger of warranties.

Waiver.

Warnings.

Applicability.

Where plaintiff brought tort and contract claims against defendant for dissatisfaction with a horse, remedies prescribed in this chapter for a buyer against a seller of goods were inapplicable since the positions of plaintiff and defendant were not those of buyer and seller, and since the agreement was for personal ser-

vices and not for a sale. *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996).

Breach.

Recovery on the theory of breach of implied warranty was denied where goods were fit for the intended purpose. *Flippo v. Mode O'Day Frock Shops*, 248 Ark. 1, 449 S.W.2d 692 (1970).

No breach of implied warranties of merchantability or fitness for particular use established. *Equipment Supply Co. v. Smith*, 255 Ark. 678, 502 S.W.2d 467 (1973).

In recovery for breach of implied warranty of merchantability, the plaintiff must prove (1) that he has sustained damages; (2) that the product sold to him was not merchantable, i.e., fit for the ordinary purpose for which such goods are used; (3)

that this unmerchantable condition was a proximate cause of his damages; and (4) that he was a person whom the defendant might reasonably expect to use or be affected by the product. *E.I. Du Pont de Nemours & Co. v. Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983); *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd* sub nom. *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

No claim stated for breach of implied warranty of merchantability existed where there were no charges that the cigarettes were not properly labeled, or that the cigarettes smoked by the Fund's participants were of an inferior or atypical grade from those usually sold, or that they failed to live up to promises made on the container. A "generally defective" type of allegation was not adequate. *Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp. 2d 936 (E.D. Ark. 1999).

Fit for Ordinary Purposes.

Feed that made cows sick was not fit for its ordinary purpose, and the trial court correctly instructed on the issue of breach of warranty of merchantability. *Purina Mills, Inc. v. Askins*, 317 Ark. 58, 875 S.W.2d 843 (1994).

Fitness for Use.

Where assignee of lease of television broadcasting equipment relied on an express warranty from lessor that the equipment would be put in first class condition, the statement amounted to a warranty that the goods were fit for the intended use. *KLPR TV, Inc. v. Visual Elec. Corp.*, 327 F. Supp. 315 (W.D. Ark. 1971), modified on other grounds, 465 F.2d 1382 (8th Cir. 1972).

Salesman's representation of weedkiller effectiveness implied a warranty of fitness for the ordinary use of such materials. *Chemco Indus. Applicators Co. v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973).

Merger of Warranties.

Motions for a directed verdict on the implied warranty of merchantability issue under this section, and on the issue of an implied warranty for a particular purpose under § 4-2-315, were properly denied where the particular purpose for which buyer purchased the product coincided with its ordinary use and purpose, and as a consequence the implied warranties of merchantability and fitness merged. *F.L. Davis Bldrs. Supply, Inc. v. Knapp*, 42 Ark. App. 52, 853 S.W.2d 288 (1993).

Waiver.

Buyer's exercise of ownership over car following an initial attempt to return it did not constitute a waiver of breach of warranty claims where seller refused to allow revocation. *Currier v. Spencer*, 299 Ark. 182, 772 S.W.2d 309 (1989).

Warnings.

The plaintiff originally has the burden of proving the warnings or instructions provided on a product's label were inadequate; once a plaintiff proves the lack of an adequate warning or instruction, a presumption arises that the user would have read and heeded adequate warnings or instructions, rebuttable by evidence which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances. *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992).

Cited: *Bailey v. Ford Motor Co.*, 246 Ark. 950, 440 S.W.2d 238 (1969); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972); *Hubbard v. Moore*, 537 F. Supp. 126 (W.D. Ark. 1982); *Brewer v. Jeep Corp.*, 724 F.2d 653 (8th Cir. 1983); *Stalter v. Coca-Cola Bottling Co.*, 282 Ark. 443, 669 S.W.2d 460 (1984); *Shaver v. Spann*, 35 Ark. App. 118, 813 S.W.2d 280 (1991); *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994); *Cartillar v. Turbine Conversions, Ltd.*, 187 F.3d 858 (8th Cir. 1999).

4-2-315. Implied warranty — Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

History. Acts 1961, No. 185, § 2-315; A.S.A. 1947, § 85-2-315.

RESEARCH REFERENCES

Ark. L. Notes. Copeland, The Implied Warranty of Habitability and the Use of the Uniform Commercial Code by Analogy, 1983 Ark. L. Notes 5.

Looney, The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and the Uniform Commercial Code, 1990 Ark. L. Notes 75.

Ark. L. Rev. Torts — Strict Liability in Products Cases, 22 Ark. L. Rev. 796.

For Whom the Bell Tolls — An Interpretation of the UCC's Exception as to Accrual of a Cause of Action for Future Performance Warranties, 28 Ark. L. Rev. 312.

Voucher to Products Liability: The Mechanics of U.C.C. § 2-607(5)(a), 29 Ark. L. Rev. 486.

Magnuson-Moss vs. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection, 30 Ark. L. Rev. 21.

Note, Liability of Builder-Vendor: Blagg v. Fred Hunt Co., 35 Ark. L. Rev. 654.

UALR L.J. Tyler, Survey of Business Law, 3 UALR L.J. 149.

Arkansas Law Survey, Roberts and Deere, Torts, 8 UALR L.J. 207.

CASE NOTES

ANALYSIS

Applicability.

Breach.

Creation of warranty.

Cross complaint.

Exclusions, modifications, etc.

Knowledge of purpose.

Lack of privity.

Merger of warranties.

Proof of damages.

Applicability.

Where plaintiff brought tort and contract claims against defendant for dissatisfaction with a horse, remedies prescribed in this chapter for a buyer against a seller of goods were inapplicable since the positions of plaintiff and defendant were not those of buyer and seller, and since the agreement was for personal services and not for a sale. *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996).

Breach.

Evidence insufficient to establish breach of warranty. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964); *Equipment Supply Co. v. Smith*, 255 Ark. 678, 502 S.W.2d 467 (1973).

To recover for breach of an implied warranty of fitness for a particular purpose, the plaintiff must prove (1) that he has sustained damages; (2) that at the time of contracting, the defendant had reason to

know the particular purpose for which the product was required; (3) that defendant knew the buyer was relying on defendant's skill or judgment to select or furnish the product; (4) that the product was not fit for the purpose for which it was required; (5) that this unfitness was a proximate cause of plaintiff's damages; and (6) that plaintiff was a person whom defendant would reasonably have expected to use the product. *E.I. Du Pont de Nemours & Co. v. Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983).

Creation of Warranty.

Implied warranty of fitness held established. *Little Rock Land Co. v. Raper*, 245 Ark. 641, 433 S.W.2d 836 (1968); *DeLamar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970); *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971); *KLPR TV, Inc. v. Visual Elecs. Corp.*, 327 F. Supp. 315 (W.D. Ark. 1971), modified on other grounds, 465 F.2d 1382 (8th Cir. 1972); *Chemco Indus. Applicators Co. v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973); *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Cross Complaint.

Since there was an implied warranty of fitness from the installer of a passenger elevator to the owner of the building the owner could bring the installer into an

action by an injured passenger against such owner by a cross complaint alleging breach of warranty. *Little Rock Land Co. v. Raper*, 245 Ark. 641, 433 S.W.2d 836 (1968).

Exclusions, Modifications, Etc.

Exclusions or modifications of the implied warranty of fitness are not effective unless they are conspicuous. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

An attempted limitation or modification of an implied warranty long after the contract of purchase was signed was ineffective as amounting to a unilateral attempt of one party to limit its obligations. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Disclaimer attempting to exclude or modify implied warranties was ineffective as a matter of law where it was in the body of the instrument and in the same size and color of type as other provisions. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Knowledge of Purpose.

It is enough if the supplier is aware of the particular purpose a buyer has in mind and permits the buyer to make the purchase on the assumption that the goods are suitable for his needs; it is enough that under all the circumstances the supplier has reason to realize the purpose intended or that the reliance exists. *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

Plaintiffs' claim for a breach of implied warranty of fitness for a particular pur-

pose failed where it made no allegation of any particular purpose for which it (or its participants) bought cigarettes, and no allegation that the Fund or its participants ever told the defendants of any such need. *Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp. 2d 936 (E.D. Ark. 1999).

Lack of Privity.

Section 4-86-101 eliminated lack of privity as a defense in an action against the manufacturer or seller of goods for breach of warranty if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Merger of Warranties.

Motions for a directed verdict on the implied warranty of merchantability issue under § 4-2-314, and on the issue of an implied warranty for a particular purpose under this section, were properly denied where the particular purpose for which buyer purchased the product coincided with its ordinary use and purpose, and as a consequence the implied warranties of merchantability and fitness merged. *F.L. Davis Bldrs. Supply, Inc. v. Knapp*, 42 Ark. App. 52, 853 S.W.2d 288 (1993).

Proof of Damages.

Whether breach of warranty of fitness in failing to provide proper product caused damage is a question of fact for jury. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Stalter v. Coca-Cola Bottling Co.*, 282 Ark. 443, 669 S.W.2d 460 (1984); *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994); *Cartillar v. Turbine Conversions, Ltd.*, 187 F.3d 858 (8th Cir. 1999).

4-2-316. Exclusion or modification of warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence

(§ 4-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(d)(i) The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma, or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma, or tissue or organs shall not, for the purpose of this article, be considered commodities subject to sale or barter but shall be considered as medical services.

(ii) With respect to the sale of bovine, porcine, ovine, and equine animals, or poultry, there shall be no implied warranty that the animals are free from disease or sickness. This exemption shall not apply when the seller knowingly sells animals which are diseased or sick.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy (§§ 4-2-718, 4-2-719).

History. Acts 1961, No. 185, § 2-316; 1969, No. 41, § 1; 1981, No. 822, § 1; A.S.A. 1947, § 85-2-316.

RESEARCH REFERENCES

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Legislative Note — Act 111 of 1973: An Act to Impose Liability for Injury and Damages Done in Certain Circumstances by Defective Products, 27 Ark. L. Rev. 562.

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The Personal Injury Action in Warranty — Has the Arkansas Strict Liability Statute Rendered It Obsolete? 28 Ark. L. Rev. 335.

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Magnuson-Moss vs. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection, 30 Ark. L. Rev. 21.

CASE NOTES

ANALYSIS

Applicability.

"As Is" transactions.

Consistency of construction.

Conspicuousness.

Course of dealing.

Effect of disclaimer.

Exclusions.

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Modifications.

Trade usage.

Applicability.

Where plaintiff brought tort and contract claims against defendant for dissatisfaction with a horse, remedies prescribed in this chapter for a buyer against a seller of goods were inapplicable since the positions of plaintiff and defendant were not those of buyer and seller, and since the agreement was for personal services and not for a sale. *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996).

"As Is" Transactions.

Only implied, not express, warranties are excluded in "as is" transactions. *Tenwick v. Byrd*, 9 Ark. App. 340, 659 S.W.2d 950 (1983).

Consistency of Construction.

Where there was an express warranty on the sale of cotton seed required by law, an attempt to modify such warranty by a statement of "non-warranty" on the invoice was inconsistent with the express warranty and to that extent unreasonable. *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 95, 436 S.W.2d 820 (1969).

Conspicuousness.

Exclusions or modifications of the im-

plied warranty of fitness are not effective unless they are conspicuous. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

The requirement that an exclusion or modification of implied warranties be conspicuous is to insure that attention of the buyer can reasonably be expected to be brought to it. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Disclaimer held to be insufficiently conspicuous. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977); *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970); *DeLamar Motor Co. v. White*, 249 Ark. 708, 460 S.W.2d 802 (1970); *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Where documents involved were before Supreme Court on appeal, Supreme Court was in a position to determine whether express warranty which purported to be in lieu of all others was conspicuous. *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969).

Where the manufacturer's disclaimer appeared on the back of the dealer's purchase order, but in print larger than the surrounding writing, and writing in large print on the front of the form, directly above the line for the buyer's signature,

directed the buyer to the controlling terms on the back, the writing was such that should have attracted the attention of a reasonable buyer and, therefore, satisfied the standard for conspicuousness. *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299 (8th Cir. 1986).

Language contained on defendant's standard invoices, stating that all claims for losses had to be submitted in writing within 30 days of delivery, was insufficient to exclude or modify the implied warranty of merchantability. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

Course of Dealing.

The relatively few sales of stress testing machines and patient carts accompanied by a standard warranty did not establish a course of dealing that would extend the disclaimer provisions to an agreement to purchase a computer-assisted electrocardiographic system, inasmuch as the different nature and magnitude of the complex system made any course of dealing which might have existed as to the sales of carts and stress testing machines inapplicable. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Effect of Disclaimer.

A disclaimer of warranties under this section limits the seller's liability by reducing the number of circumstances in which the seller will be in breach of the contract; it precludes the existence of a cause of action. *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

A clear manufacturer's disclaimer or limitation of remedy made in a dealer's contract may become part of the basis of the bargain and is not ineffective solely because the manufacturer is not a party to the contract. *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299 (8th Cir. 1986).

Where the disclaimer was in bold type on page five of the label and clearly mentioned merchantability, the label could have been effective to disclaim all implied warranties under subsection (2). *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

Exclusions.

A fine print clause excluding express warranties did not comply with subsection

(2) of this section. *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W.2d 46 (1968).

Express warranty which was actually in the nature of a disclaimer of all other warranties was invalid as not mentioning merchantability and as not being conspicuous. *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969).

Implied warranties may be excluded by language or expressions which in common understanding call the buyer's attention to the exclusion of warranties and make plain that there is no implied warranty by course of dealings or course of performance or usage of trade. *Bailey v. Ford Motor Co.*, 246 Ark. 950, 440 S.W.2d 238 (1969).

An express warranty may exclude an implied warranty of merchantability if the exclusion mentions the word "merchantability" and, if written, is conspicuous. *Walker Ford Sales v. Gaither*, 265 Ark. 275, 578 S.W.2d 23 (1979).

A manufacturer may disclaim implied warranties and limit the remedy for breach of warranty in a dealer's form contract to which it is not a party. *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299 (8th Cir. 1986).

Leases.

Subsection (2) of this section is applicable to leases that are analogous to sales. *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W.2d 46 (1968).

Limitation of Remedies.

Subsection (4) of this section must be applied in accordance with the provisions of §§ 4-2-718 and 4-2-719. *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970).

Where manufacturer intended the repair remedy to be exclusive, but did not state that intention in express language in the "general warranty provisions" which went to "obligations" and "warranties," and not to remedies, instructions given to jury to find for the plaintiff the amount of damages if the warranty was breached and the breach resulted in damages to plaintiff, was correct. *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971).

Where the buyer of the computer was college-educated with some background in commercial law who shopped extensively

for computer equipment to suit his needs, the limited remedy clause, which committed the manufacturer to correcting defects in workmanship and equipment to ensure that the equipment conformed to the contract, was not unconscionably one-sided. *Hunter v. Texas Instruments, Inc.*, 798 F.2d 299 (8th Cir. 1986).

Modifications.

An attempted limitation or modification of an implied warranty long after the contract of purchase was signed was ineffective as amounting to a unilateral attempt of one party to limit its obligations. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), overruled on other grounds by *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Trade Usage.

Where the evidence did not indicate buyer was the type of party who was or

should be aware of the industry's trade customs, since buyer was entering a market in which it was relying on seller's expertise, the district court was not clearly erroneous in finding seller's implied warranties were not effectively disclaimed. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Cited: *Little Rock Land Co. v. Raper*, 245 Ark. 641, 433 S.W.2d 836 (1968); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Arkansas Power & Light Co. v. Home Ins. Co.*, 602 F. Supp. 740 (E.D. Ark. 1985); *Kirkendall v. Harbor Ins. Co.*, 698 F. Supp. 768 (W.D. Ark. 1988) (decision under prior law) *Boren v. State*, 297 Ark. 220, 761 S.W.2d 885 (1988); *Kirkendall v. Harbor Ins. Co.*, 887 F.2d 857 (8th Cir. 1989); *Shaver v. Spann*, 35 Ark. App. 118, 813 S.W.2d 280 (1991); *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997).

4-2-317. Cumulation and conflict of warranties express or implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

History. Acts 1961, No. 185, § 2-317; A.S.A. 1947, § 85-2-317.

RESEARCH REFERENCES

Ark. L. Notes. Copeland, The Implied Warranty of Habitability and the Use of the Uniform Commercial Code by Analogy, 1983 Ark. L. Notes 5.

Ark. L. Rev. Chaney, Comments: Utilization of Disclaimer of Warranty Clauses Under the UCC, 32 Ark. L. Rev. 772.

CASE NOTES

Merger of Warranties.

If the particular purpose for which goods are to be used coincides with their

general functional use, the implied warranty of fitness for a particular purpose merges with the implied warranty of mer-

chantability. *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 301 Ark. 436, 785 S.W.2d 13 (1990).

Cited: *Wawak v. Stewart*, 247 Ark.

1093, 449 S.W.2d 922 (1970); *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983).

4-2-318. Third party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

History. Acts 1961, No. 185, § 2-318; A.S.A. 1947, § 85-2-318.

RESEARCH REFERENCES

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Brill, *Harvey v. Eastman Kodak Company*: Faculty Note, 34 Ark. L. Rev. 722.

CASE NOTES

ANALYSIS

Privity.

Seller's liability.

Privity.

By virtue of this section the legislature has abolished the defense of privity in a breach of warranty action to a natural person who is in the family or household of the buyer or is a guest in his household. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964).

In a breach of warranty action where the cylinder of oxygen sold by the vendor was being used by an employee of the buyer, who was injured in such use, the action by the employee was not barred by lack of privity. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964).

The employee of the original purchaser is not barred by the defense of privity from bringing an action for breach of warranty against the original vendor. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964).

Seller's Liability.

The evidence presented by plaintiff in her effort to assign liability to the manufacturer was not substantial enough to negate the existence of other possibilities of sources of contamination such as negligence on the part of the seller. *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994).

Cited: *Myers v. Council Mfg. Corp.*, 276 F. Supp. 541 (W.D. Ark. 1967); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

4-2-319. F.O.B. and F.A.S. terms.

(1) Unless otherwise agreed the terms F.O.B. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which:

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (§ 4-2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (§ 4-2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this chapter on the form of bill of lading (§ 4-2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means “free alongside”) at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (§ 4-2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History. Acts 1961, No. 185, § 2-319;
A.S.A. 1947, § 85-2-319.

CASE NOTES**F.O.B. Destination.**

Where sand and gravel company hired independent haulers to deliver its product to purchasers as required by the company's F.O.B. destination contract, a gross

receipts tax was properly collected on the full delivery price without any deduction therefrom for freight. *Belvedere Sand & Gravel Co. v. Heath*, 259 Ark. 767, 536 S.W.2d 312 (1976), overruled on other

grounds, *Foote's Dixie Dandy, Inc. v. Cited: Unlaub Co. v. Sexton*, 568 F.2d McHenry, 270 Ark 816, 607 S.W.2d 323 72 (8th Cir. 1977). (1980).

4-2-320. C.I.F. and C. & F. terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents, and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History. Acts 1961, No. 185, § 2-320; A.S.A. 1947, § 85-2-320.

4-2-321. C.I.F. or C. & F. — "Net landed weights" — "Payment on arrival" — Warranty of condition on arrival.

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the

contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

History. Acts 1961, No. 185, § 2-321;
A.S.A. 1947, § 85-2-321.

4-2-322. Delivery “ex-ship”.

(1) Unless otherwise agreed a term for delivery of goods “ex-ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

History. Acts 1961, No. 185, § 2-322;
A.S.A. 1947, § 85-2-322.

4-2-323. Form of bill of lading required in overseas shipment — “Overseas”.

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this chapter on cure of improper delivery (§ 4-2-508(1)); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless

require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

History. Acts 1961, No. 185, § 2-323;
A.S.A. 1947, § 85-2-323.

4-2-324. "No arrival, no sale" term.

Under a term, "no arrival, no sale" or terms of like meaning, unless otherwise agreed:

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (§ 4-2-613).

History. Acts 1961, No. 185, § 2-324;
A.S.A. 1947, § 85-2-324.

4-2-325. "Letter of credit" term — "Confirmed credit".

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

History. Acts 1961, No. 185, § 2-325;
A.S.A. 1947, § 85-2-325.

4-2-326. Sale on approval and sale or return — Rights of creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a "sale on approval" if the goods are delivered primarily for use, and

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Chapter (§ 4-2-201) and as contradicting the sale aspect of the contract within the provisions of this Chapter on parol or extrinsic evidence (§ 4-2-202).

History. Acts 1961, No. 185, § 2-326; 1983, No. 820, § 7; A.S.A. 1947, § 85-2-326; Acts 1997, No. 395, § 1; 2001, No. 1439, § 6.

Amendments. The 1997 amendment substituted "subsection (6) of this section"

for "an applicable law" in (3)(a); and added (6).

The 2001 amendment rewrote the section.

Cross References. Artists' Consignment Act, § 4-73-201 et seq.

RESEARCH REFERENCES

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the Uniform Commercial Code's Consignment Rule, 37 Ark. L. Rev. 312.

CASE NOTES

ANALYSIS

Applicability.

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Priority of claims.

Applicability.

Even if a particular arrangement is found to constitute a bailment as opposed to a sale, that does not preclude a finding that there is also a consignment arrangement and, hence, that this section is applicable. *Simmons First Nat'l Bank v. Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983).

Bailment.

Where farmers, who left their seed in storage with the debtor seed company, intended only a bailment contract with the debtor, but did not comply with the provisions of subdivisions (3)(a)-(c), the stored seed was delivered for sale and was subject to the claims of the debtor's creditors. *First State Bank v. Miller*, 119 Bankr. 660 (W.D. Ark. 1990).

Goods Delivered for Sale.

Subsection (3) of this section is construed so as to resolve all reasonable doubts as to the nature of the transaction in favor of the general creditors of the

buyer. *Medalist Forming Sys. v. Malvern Nat'l Bank*, 309 Ark. 561, 832 S.W.2d 228 (1992).

If a delivering party does not avail itself of any of the options under subsection (3), the goods at issue are subject to the claims of the receiving party's creditors even in a transaction that is not a true sale at all given that the uniqueness of this section is that it applies to transactions that do not fall within the everyday connotation of the word "sale." *Medalist Forming Sys. v. Malvern Nat'l Bank*, 309 Ark. 561, 832 S.W.2d 228 (1992).

Failure of supplier of goods for sale to protect its interest by filing under Article 9 of the U.C.C. or by posting a sign evidencing its interest in the goods left the bank without knowledge of another claim to rights in debtor's inventory and accounts receivable; given that failure, the U.C.C. policy of protecting disclosed creditors dictates that the bank receive priority over a party claiming priority based on an undisclosed, private agreement with debtor. *Medalist Forming Sys. v. Malvern Nat'l Bank*, 309 Ark. 561, 832 S.W.2d 228 (1992).

Where invoice, inventory, and shipping evidence supported the conclusion that the raw materials delivered to debtor

were delivered "for sale", the bank should prevail regardless of whether the arrangement between debtor and supplier of goods constituted a bailment. *Medalist Forming Sys. v. Malvern Nat'l Bank*, 309 Ark. 561, 832 S.W.2d 228 (1992).

Transactions between a supplier and a debtor were on a sale or return basis as described in subsection (3) of this section and, as the supplier did not comply with the statute, the security interest of a bank in all of the debtor's inventory was attached to the items supplied by the supplier. *In re Truck Accessories Distrib., Inc.*, 238 Bankr. 444 (E.D. Ark. 1999).

Priority of Claims.

If a transaction is deemed to constitute a consignment sale, the consignment seller may obtain priority over the consignment buyer's creditors only by complying with the notice requirements of subsection (3) of this section. *Simmons First Nat'l Bank v. Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983).

Cited: *Exchange Bank & Trust Co. v. Glenn's Marine, Inc.*, 265 Ark. 508, 579 S.W.2d 358 (1979).

4-2-327. Special incidents of sale on approval and sale or return.

(1) Under a sale on approval unless otherwise agreed:

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer's risk and expense.

History. Acts 1961, No. 185, § 2-327; A.S.A. 1947, § 85-2-327.

CASE NOTES

Passage of Title.

On a sale on approval, unless otherwise agreed, title passes only at the time the

buyer accepts. *Exchange Bank & Trust Co. v. Glenn's Marine, Inc.*, 265 Ark. 508, 579 S.W.2d 358 (1979).

4-2-328. Sale by auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

History. Acts 1961, No. 185, § 2-328;
A.S.A. 1947, § 85-2-328.

CASE NOTES

ANALYSIS

Bankruptcy.

By-bidding.

Bankruptcy.

The fact that a sale may have been final under state law does not make the sale final for bankruptcy purposes. *Razorback Moving & Storage, Inc. v. Rice* (In re Allison Whse. & Transf., Inc.), 145 Bankr. 293 (Bankr. E.D. Ark. 1992).

By-Bidding.

Although there is no specific statute in this state which forbids a person from acting as a "by-bidder" at an auction, which is someone employed by the seller to bid on the goods so as to drive up the prices, subsection (4) of this section appears to articulate the policy with respect to by-bidding and makes such alleged agreements illegal as a matter of public policy. *Wade v. Ingram*, 528 F. Supp. 495 (E.D. Ark. 1981).

PART 4 — TITLE, CREDITORS, AND GOOD FAITH PURCHASERS

SECTION.

4-2-401. Passing of title — Reservation for security — Limited application of section.

4-2-402. Rights of seller's creditors against sold goods.

SECTION.

4-2-403. Power to transfer — Good faith purchase of goods — "Entrusting".

Publisher's Notes. For Comments regarding the Uniform Commercial Code; see Commentaries Volume A.

RESEARCH REFERENCES

ALR. What constitutes entrusting goods to merchant dealer under UCC § 2-403. 59 ALR 4th 567.

Am. Jur. 67 Am. Jur. 2d, Sales, § 387 et seq.

4-2-401. Passing of title — Reservation for security — Limited application of section.

Each provision of this chapter with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (§ 4-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this subtitle. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on secured transactions (chapter 9 of this title), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods:

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

History. Acts 1961, No. 185, § 2-401;
A.S.A. 1947, § 85-2-401.

RESEARCH REFERENCES

Ark. L. Rev. Commercial Law — Re- opportunity for Prior Hearings in Replevin,
possession of Chattels — Notice and Op- 26 Ark. L. Rev. 534.

CASE NOTES

ANALYSIS

Evidence.

Execution of contract.

Salvage sale.

Evidence.

Trial court's finding as to when title passed was not clearly against preponderance of evidence. *Merchants & Planters Bank & Trust Co. v. Phoenix Hous. Sys.*, 21 Ark. App. 153, 729 S.W.2d 433 (1987).

Execution of Contract.

Contract which stated that the seller fully understands that he or she is transferring title of the grain to the buyer and is relinquishing all control of the grain to the buyer was an explicit agreement by the parties that title would pass at the time the contract was executed rather than at delivery of the crops. *Cullipher v. Lindsey Rice Mill, Inc.*, 730 F. Supp. 970 (W.D. Ark. 1990).

Salvage Sale.

An insurance company's salvage sale of

an aircraft passed title thereto to the buyer on delivery of the plane to him even though he was given no bill of sale, did not pay the purchase price, and did not obtain registration of the plane in his name with the Federal Aviation Agency. *American Aviation, Inc. v. Aviation Ins. Managers, Inc.*, 244 Ark. 829, 427 S.W.2d 544 (1968).

Cited: *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. 1977); *Exchange Bank & Trust Co. v. Glenn's Marine, Inc.*, 265 Ark. 508, 579 S.W.2d 358 (1979); *Hartford Fire Ins. Co. v. Stanley*, 7 Ark. App. 94, 644 S.W.2d 628 (1983); *Farmers Rice Milling Co. v. Hawkins (In re Bearhouse, Inc.)*, 84 Bankr. 552 (Bankr. W.D. Ark. 1988); *Reynolds v. Commodity Credit Corp.*, 300 Ark. 441, 780 S.W.2d 15 (1989); *Beebe v. MacMillan Petro. (Ark.), Inc.*, 115 Bankr. 175 (Bankr. W.D. Ark. 1990); *Fraser Bros. v. Darragh Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994).

4-2-402. Rights of seller's creditors against sold goods.

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this chapter (§§ 4-2-502 and 4-2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the chapter on secured transactions (chapter 9 of this title); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this chapter constitute the transaction a fraudulent transfer or voidable preference.

History. Acts 1961, No. 185, § 2-402;
A.S.A. 1947, § 85-2-402.

4-2-403. Power to transfer — Good faith purchase of goods — “Entrusting”.

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser; or
(b) the delivery was in exchange for a check which is later dishonored; or

(c) it was agreed that the transaction was to be a “cash sale”; or
(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods has been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the chapters on secured transactions (chapter 9 of this title), and documents of title (chapter 7 of this title).

History. Acts 1961, No. 185, § 2-403;
A.S.A. 1947, § 85-2-403; Acts 1991, No. 344, § 3.

RESEARCH REFERENCES

ALR. What constitutes “entrusting goods” to merchant dealer under UCC § 2-403. 59 ALR 4th 567.

Ark. L. Notes. Laurence, Bona Fide Purchaser Analysis, Beverage Products Corporation v. Robinson and the Case against Very Short Opinion, 1990 Ark. L. Notes 85.

Ark. L. Rev. Note, Act 401 of the Public Grain Warehouse Law: An Exception to the U.C.C. Concept of Voidable Title, 37 Ark. L. Rev. 293.

Nickles and Adams, Pawnbrokers, Po-

lice, and Property Rights — A Proposed Constitutional Balance, 47 Ark. L. Rev. 793.

UALR L.J. Survey of Arkansas: Business Law, 6 UALR L.J. 73.

Note, Storers of Grain — Arkansas Stands Alone in Protecting the Rights of Depositors of Grain in Public Warehouses, etc., 9 UALR L.J. 699.

Adams, “Clear Title” for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

CASE NOTES

ANALYSIS

Entrustment.
 Exceptions.
 Innocent purchaser for value.
 Misconduct.

Entrustment.

The entrustment of possession provisions in subsections (2) and (3) of this section are most applicable to a repossessing lien holder with right of sale, and such a finance company had no right to complain as against the purchaser of a car it had repossessed and left in the hands of a dealer, whether it be considered as a consignor or a lender with a security interest. *Commercial Credit Corp. v. Associates Dist. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969).

Although defendant-purchaser bought soft drink machine from seller in good faith, plaintiff was entitled to possession of the machine where plaintiff had originally entrusted the machine to a third party from whom it was seized and sold, in execution of a judgment against him, to seller, who sold it to defendant-purchaser; neither the third party or the subsequent purchasers had obtained title to the machine as plaintiff had never intended title to pass to the third party to whom the machine was originally loaned. *Beverage Prods. Corp. v. Robinson*, 27 Ark. App. 225, 769 S.W.2d 424 (1989).

Exceptions.

Four exceptions to the derivative title principle in subsection (1) have been recognized in this subtitle and at common

law. *Wood v. Corner Stone Bank*, 315 Ark. 200, 866 S.W.2d 385 (1993).

The "preclusion exception" doctrine which is found at common law and equity, rather than in this subtitle, holds that irrespective of the property holder's actual title — void, voidable, or good — there will be times when the original owner's behavior does not justify allowing him to dispute the property holder's title; therefore, the purchaser of the property will win, not so much on his own behalf but rather due to the original owner's procedural inability to force the contrary results. *Wood v. Corner Stone Bank*, 315 Ark. 200, 866 S.W.2d 385 (1993).

Innocent Purchaser for Value.

Evidence was sufficient to support the trial court's finding that the defendant was not an innocent purchaser for value. *Hollis v. Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967).

Misconduct.

Defendants' conduct in removing trailer from bank's possession precluded them from disputing the bank's proprietary interest in the trailer; thus, the trial court's finding of a conversion of property, and award of compensatory and punitive damages, was correct. *Wood v. Corner Stone Bank*, 315 Ark. 200, 866 S.W.2d 385 (1993).

Cited: *Rex Fin. Corp. v. Marshall*, 406 F. Supp. 567 (W.D. Ark. 1976); *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 621 S.W.2d 683 (1981); *Farm Bureau Mut. Ins. Co. v. Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985).

PART 5 — PERFORMANCE

SECTION.

- 4-2-501. Insurable interest in goods — Manner of identification of goods.
- 4-2-502. Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency.
- 4-2-503. Manner of seller's tender of delivery.
- 4-2-504. Shipment by seller.
- 4-2-505. Seller's shipment under reservation.
- 4-2-506. Rights of financing agency.

SECTION.

- 4-2-507. Effect of seller's tender — Delivery on condition.
- 4-2-508. Cure by seller of improper tender or delivery — Replacement.
- 4-2-509. Risk of loss in the absence of breach.
- 4-2-510. Effect of breach on risk of loss.
- 4-2-511. Tender of payment by buyer — Payment by check.
- 4-2-512. Payment by buyer before inspection.

SECTION.

4-2-513. Buyer's right to inspection of goods.

4-2-514. When documents deliverable on acceptance — When on payment.

SECTION.

4-2-515. Preserving evidence of goods in dispute.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial

revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

ALR. Inspection of goods under UCC § 2-513. 34 ALR 4th 726.

Cure of improper tender or delivery by seller under UCC § 2-508. 36 ALR 4th 544.

Place of buyer's inspection of goods under UCC § 2-513. 36 ALR 4th 726.

Computer sales and leases, time when cause of action for failure of performance accrues. 90 ALR 4th 298.

Am. Jur. 67 Am. Jur. 2d, Sales, § 503 et seq.

4-2-501. Insurable interest in goods — Manner of identification of goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young

to be born within twelve (12) months after contracting or for the sale of crops to be harvested within twelve (12) months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

History. Acts 1961, No. 185, § 2-501;
A.S.A. 1947, § 85-2-501.

CASE NOTES

Cited: In re Estate of Spann, 257 Ark.
857, 520 S.W.2d 286 (1975).

4-2-502. Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency.

(1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of § 4-2-501 may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under subsection (1) (a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

History. Acts 1961, No. 185, § 2-502;
A.S.A. 1947, § 85-2-502; Acts 2001, No. 1439, § 7.

Amendments. The 2001 amendment rewrote the section.

4-2-503. Manner of seller's tender of delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this chapter, and in particular:

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within § 4-2-504 respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this chapter with respect to bills of lading in a set (§ 4-2-323(2)); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

History. Acts 1961, No. 185, § 2-503;
A.S.A. 1947, § 85-2-503.

CASE NOTES

Cited: *Unlaub Co. v. Sexton*, 568 F.2d
72 (8th Cir. 1977).

4-2-504. Shipment by seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

History. Acts 1961, No. 185, § 2-504;
A.S.A. 1947, § 85-2-504.

CASE NOTES

Delivery Date.

In action for alleged breach of contract for sale, where buyer asserted his cancellation of the contract was valid because delivery was past due, it was for the trial

court, sitting as a jury, to resolve conflicting versions as to the delivery date. *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976).

4-2-505. Seller's shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (§ 4-2-507(2)) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

History. Acts 1961, No. 185, § 2-505;
A.S.A. 1947, § 85-2-505.

4-2-506. Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

History. Acts 1961, No. 185, § 2-506;
A.S.A. 1947, § 85-2-506.

4-2-507. Effect of seller's tender — Delivery on condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

History. Acts 1961, No. 185, § 2-507;
A.S.A. 1947, § 85-2-507.

4-2-508. Cure by seller of improper tender or delivery — Replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

History. Acts 1961, No. 185, § 2-508;
A.S.A. 1947, § 85-2-508.

RESEARCH REFERENCES

Ark. L. Rev. Commercial Law — The Effect of the Seller's Right to Cure on the	Buyer's Remedy of Rescission, 28 Ark. L. Rev. 297.
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CASE NOTES

ANALYSIS

Conforming delivery.
Rescission.

Conforming Delivery.

Evidence that boat bought by buyer was not identical to the one contracted for and that seller failed to make a conforming

delivery by making repairs was sufficient to rescind the contract. *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972).

Rescission.

Evidence was insufficient to support the buyer's claim that he rescinded the con-

tract to purchase the inventory and business name. *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980).

4-2-509. Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (§ 4-2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a nonnegotiable document of title or other written directions to deliver, as provided in § 4-2-503(4)(b).

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this chapter on sale on approval (§ 4-2-327) and on effect of breach on risk of loss (§ 4-2-510).

History. Acts 1961, No. 185, § 2-509;
A.S.A. 1947, § 85-2-509.

RESEARCH REFERENCES

Ark. L. Rev. Uniform Commercial Code
— Risk of Loss, 28 Ark. L. Rev. 508.

CASE NOTES

Incomplete Performance by Seller.

Where mobile home was delivered to buyer under purchase agreement whereby price included installation of utilities by seller before buyer would accept and fire destroyed home before installation com-

pleted, risk of loss remained with seller due to incomplete performance. *Southland Mobile Home Corp. v. Chyrchel*, 255 Ark. 366, 500 S.W.2d 778 (1973).

4-2-510. Effect of breach on risk of loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

History. Acts 1961, No. 185, § 2-510;
A.S.A. 1947, § 85-2-510.

RESEARCH REFERENCES

Ark. L. Rev. Uniform Commercial Code
— Risk of Loss, 28 Ark. L. Rev. 508.

CASE NOTES

Seller's Liability.

Where a mare is sold as being in foal when the seller knows that she is not, is returned to the seller to be bred in accordance with business custom, and dies while in seller's possession, this section would support a finding of liability on the

seller for the purchase price. *McKnight v. Bellamy*, 248 Ark. 27, 449 S.W.2d 706 (1970).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Southland Mobile Home Corp. v. Chyrchel*, 255 Ark. 366, 500 S.W.2d 778 (1973).

4-2-511. Tender of payment by buyer — Payment by check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this subtitle on the effect of an instrument on an obligation (§ 4-3-310), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

History. Acts 1961, No. 185, § 2-511;
A.S.A. 1947, § 85-2-511.

4-2-512. Payment by buyer before inspection.

(1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless

(a) the non-conformity appears without inspection; or

(b) despite tender of the required documents the circumstances would justify injunction against honor under § 4-5-109(b).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

History. Acts 1961, No. 185, § 2-512; A.S.A. 1947, § 85-2-512; Acts 1997, No. 1070, § 3.

A.C.R.C. Notes. Acts 1997, No. 1070, codified as § 4-5-118, provided: "This act applies to a letter of credit that is issued on or after the effective date of this act [August 1, 1997]. This act does not apply

to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act."

Amendments. The 1997 amendment substituted "under § 5-109(b)" for "under the provisions of this Act (Section 5-114)" in (1)(b).

4-2-513. Buyer's right to inspection of goods.

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this chapter on C.I.F. contracts (§ 4-2-321(3)), the buyer is not entitled to inspect the goods before payment of the price when the contract provides:

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

History. Acts 1961, No. 185, § 2-513; A.S.A. 1947, § 85-2-513.

4-2-514. When documents deliverable on acceptance — When on payment.

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three (3) days after presentment; otherwise, only on payment.

History. Acts 1961, No. 185, § 2-514;
A.S.A. 1947, § 85-2-514.

4-2-515. Preserving evidence of goods in dispute.

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

History. Acts 1961, No. 185, § 2-515;
A.S.A. 1947, § 85-2-515.

CASE NOTES

Cited: Wawak v. Stewart, 247 Ark.
1093, 449 S.W.2d 922 (1970).

PART 6 — BREACH, REPUDIATION, AND EXCUSE

SECTION.

- 4-2-601. Buyer's rights on improper delivery.
- 4-2-602. Manner and effect of rightful rejection.
- 4-2-603. Merchant buyer's duties as to rightfully rejected goods.
- 4-2-604. Buyer's options as to salvage of rightfully rejected goods.
- 4-2-605. Waiver of buyer's objections by failure to particularize.
- 4-2-606. What constitutes acceptance of goods.
- 4-2-607. Effect of acceptance — Notice of breach — Burden of establishing breach after acceptance — Notice of claim or litigation to person answerable over.

SECTION.

- 4-2-608. Revocation of acceptance in whole or in part.
- 4-2-609. Right to adequate assurance of performance.
- 4-2-610. Anticipatory repudiation.
- 4-2-611. Retraction of anticipatory repudiation.
- 4-2-612. "Installment contract" — Breach.
- 4-2-613. Casualty to identified goods.
- 4-2-614. Substituted performance.
- 4-2-615. Excuse by failure of presupposed conditions.
- 4-2-616. Procedure on notice claiming excuse.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 1969, No. 312, § 2: approved Mar. 24, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that this particular

provision of the Arkansas Law is at variance with the Uniform Commercial Code, that this Section is ambiguous, and that this Act is immediately necessary to correct same. Therefore an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health, and safety shall be in

full force and effect from and after its passage."

RESEARCH REFERENCES

ALR. Anticipatory repudiation of sales contract under UCC § 2-610. 1 ALR 4th 527.

"Commercial unit" of goods purchased under UCC § 2-601(C). 41 ALR 4th 396.

What constitutes "reasonable grounds for insecurity" justifying demand for adequate assurance of performance under UCC § 2-609. 37 ALR 5th 459.

Substantial impairment entitling buyer to revoke his acceptance of goods under UCC § 2-608(1). 38 ALR 5th 191.

Impracticability of performance of sales contract under UCC § 2-615. 55 ALR 5th 1.

Construction and application of UCC § 2-612(2), dealing with rejection of goods under installment contracts. 61 ALR 5th 611.

Am. Jur. 67 Am. Jur. 2d, Sales, § 520 et seq.

67A Am. Jur. 2d, Sales, § 861 et seq.

4-2-601. Buyer's rights on improper delivery.

Subject to the provisions of this chapter on breach in installment contracts (§ 4-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (§§ 4-2-718 and 4-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

History. Acts 1961, No. 185, § 2-601; A.S.A. 1947, § 85-2-601.

RESEARCH REFERENCES

Ark. L. Rev. Commercial Law — The Buyer's Remedy of Rescission, 28 Ark. L. Rev. 297.

CASE NOTES

ANALYSIS

Rejection.

Waiver of breach of warranty.

Rejection.

The resale of seed without knowledge of the defect that the seed had a lower germination level than that certified was not an inconsistent act by buyer constituting acceptance under § 4-2-606, and the rejection of the nonconforming goods after the second test of the germination level was within a reasonable time and seasonably notified seller under § 4-2-602 and

thus was a valid rejection under this section. *Jacob Hartz Seed Co. v. Coleman*, 271 Ark. 756, 612 S.W.2d 91 (1981).

Waiver of Breach of Warranty.

The buyer of a combine with tires too narrow for use in his fields which the seller assured him would give him satisfaction waived any breach of warranty by failure to reject it and continuing to attempt to use it upon assurance of the salesman that the seller would make it work. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

Cited: *Gramling v. Baltz*, 253 Ark. 352,

485 S.W.2d 183 (1972); *United States v. Rorex*, 737 F.2d 753 (8th Cir. 1984).

4-2-602. Manner and effect of rightful rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two (2) following sections on rejected goods (§§ 4-2-603, 4-2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (§ 4-2-711(3)), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (§ 4-2-703).

History. Acts 1961, No. 185, § 2-602; A.S.A. 1947, § 85-2-602.

RESEARCH REFERENCES

Ark. L. Rev. Notes, Ozark Kenworth, Inc. v. Neidecker: A Buyer's Continued Use of Goods After Revocation of Acceptance, 38 Ark. L. Rev. 857.

UALR L.J. Paulson, Survey of Arkansas Law: Business Law, 2 UALR L.J. 161.

CASE NOTES

ANALYSIS

Goods previously accepted.
Questions of fact.
Reasonable time for rejection.
Seasonable notification.
Use after revocation.
Waiver of breach of warranty.

Goods Previously Accepted.

In action by seller of panels for price of last shipment in which buyer counter-claimed for damages caused by the fact that the panels were of a lighter weight than that ordered, the issue was not acceptance or rejection, but revocation of acceptance, and use of the last shipment despite knowledge of its unsuitability did

not bar counterclaim for damages for non-conformity of the original shipment. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

Questions of Fact.

What constitutes a nonconforming delivery, acceptance, rejection, or revocation of acceptance are questions of fact to be determined within the framework of the facts of each particular case. *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972).

Reasonable Time for Rejection.

Under this section the buyer had a right to reject the car but this must be done within a reasonable time after delivery.

Green Chevrolet Co. v. Kemp, 241 Ark. 62, 406 S.W.2d 142 (1966).

The trial court found that the buyer had not timely rescinded the transaction, the buyer was limited to the remedies available for a breach of contract in regard to the accepted goods, and the buyer was not entitled to an award of damages under either § 4-2-714 or § 4-2-715 since the buyer failed to give notice of the alleged breach to the seller within a reasonable time after the buyer discovered or should have discovered the breach. *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980).

Seasonable Notification.

The resale of seed without knowledge of the defect that the seed had a lower germination level than that certified was not an inconsistent act by buyer constituting acceptance under § 4-2-606, and the rejection of the nonconforming goods after the second test of the germination level was within a reasonable time and seasonably notified seller under this section and thus was a valid rejection under § 4-2-601. *Jacob Hartz Seed Co. v. Coleman*, 271 Ark. 756, 612 S.W.2d 91 (1981).

Use After Revocation.

It was error for the question of the buyer's use of a truck after revocation not to have been submitted to the jury as to its reasonableness. *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984).

Waiver of Breach of Warranty.

The buyer of a combine with tires too narrow for use in his fields, but which the seller assured him would give him satisfaction, waived any breach of warranty by failure to reject it and continuing to attempt to use it upon assurance of the salesman that the seller would make it work. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

Cited: *KLPR TV, Inc. v. Visual Elecs. Corp.*, 327 F. Supp. 315 (W.D. Ark. 1971); *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. 1977); *McFall Chevrolet Co. v. Collins*, 271 Ark. 469, 609 S.W.2d 118 (1980); *United States v. Rorex*, 737 F.2d 753 (8th Cir. 1984); *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989).

4-2-603. Merchant buyer's duties as to rightfully rejected goods.

(1) Subject to any security interest in the buyer (§ 4-2-711(3)), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent (10%) on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

History. Acts 1961, No. 185, § 2-603; A.S.A. 1947, § 85-2-603.

RESEARCH REFERENCES

Ark. L. Rev. Uniform Commercial Code
— Disposition of Collateral, 20 Ark. L.
Rev. 385.

4-2-604. Buyer's options as to salvage of rightfully rejected goods.

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

History. Acts 1961, No. 185, § 2-604;
A.S.A. 1947, § 85-2-604.

RESEARCH REFERENCES

Ark. L. Rev. Uniform Commercial Code
— Disposition of Collateral, 20 Ark. L.
Rev. 385.

4-2-605. Waiver of buyer's objections by failure to particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

History. Acts 1961, No. 185, § 2-605;
A.S.A. 1947, § 85-2-605.

4-2-606. What constitutes acceptance of goods.

(1) Acceptance of goods occurs when the buyer:

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (§ 4-2-602(1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

History. Acts 1961, No. 185, § 2-606; A.S.A. 1947, § 85-2-606.

RESEARCH REFERENCES

Ark. L. Rev. Commercial Law — The Effect of the Seller's Right to Cure on the Buyer's Remedy of Rescission, 28 Ark. L. Rev. 297.

UALR L.J. Paulson, Survey of Arkansas Law: Business Law, 2 UALR L.J. 161.

CASE NOTES

ANALYSIS

Acts inconsistent with seller's ownership.
Failure to reject.
Questions of fact.
Use after discovery of unsuitability.

Acts Inconsistent with Seller's Ownership.

The resale of seed without knowledge of the defect that the seed had a lower germination level than that certified was not an inconsistent act by buyer constituting acceptance under this section, and the rejection of the nonconforming goods after a second test of the seed's germination level was within a reasonable time and seasonably notified seller under § 4-2-602 and thus was a valid rejection under § 4-2-601. *Jacob Hartz Seed Co. v. Coleman*, 271 Ark. 756, 612 S.W.2d 91 (1981).

Failure to Reject.

Under this section after failure to make an effective rejection, buyer was bound by his acceptance of the automobile and unless it was rejected within a reasonable time with notification to the seller of his decision, he waived any warranties of defective condition of the car. *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

The failure of the conditional vendee of a used truck to notify the vendor of his rejection of the truck for defects and his continuing to drive it for several months after the purchase of it amounted to an acceptance of the truck under this section.

Hudspeth Motors, Inc. v. Wilkinson, 238 Ark. 410, 382 S.W.2d 191 (1964), overruled on other grounds by *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

Goods held to have been accepted under subdivision (1)(b). *Watson v. Miears*, 612 F. Supp. 1235 (W.D. Ark. 1984), *aff'd*, 772 F.2d 433 (8th Cir. 1985).

Questions of Fact.

What constitutes a nonconforming delivery, acceptance, rejection, or revocation of acceptance are questions of fact to be determined within the framework of the facts of each particular case. *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972).

Use After Discovery of Unsuitability.

The buyer's use of a combine, after discovery that it would not work in his fields, constituted acceptance of the combine even though assured by the salesman that the seller would make it work in absence of evidence of authority of the salesman to make such statements. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

In action by seller of panels for price of last shipment in which buyer counter-claimed for damages caused by the fact that the panels were of a lighter weight than that ordered, the issue was not acceptance or rejection, but revocation of acceptance, and use of the last shipment despite knowledge of its unsuitability did

not bar counterclaim for damages for non-conformity of the original shipment. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

Cited: *KLPR TV, Inc. v. Visual Elecs. Corp.*, 327 F. Supp. 315 (W.D. Ark. 1971); *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980).

4-2-607. Effect of acceptance — Notice of breach — Burden of establishing breach after acceptance — Notice of claim or litigation to person answerable over.

- (1) The buyer must pay at the contract rate for any goods accepted.
- (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for non-conformity.
 - (3) Where a tender has been accepted
 - (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
 - (b) if the claim is one for infringement or the like (§ 4-2-312(3)) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.
 - (4) The burden is on the buyer to establish any breach with respect to the goods accepted.
 - (5) Where the buyer is sued for breach of a warranty or other obligation for which the seller is answerable over
 - (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two (2) litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.
 - (b) if the claim is one for infringement or the like (§ 4-2-312(3)) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.
 - (6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (§ 4-2-312(3)).

History. Acts 1961, No. 185, § 2-607; 1969, No. 312, § 1; A.S.A. 1947, § 85-2-607.

RESEARCH REFERENCES

Ark. L. Notes. Copeland, The Implied Warranty of Habitability and the Use of the Uniform Commercial Code by Analogy, 1983 Ark. L. Notes 5.

Smolla, What Types of Losses Are Recoverable Under Arkansas's Products Liability Law, 1984 Ark. L. Notes 11.

Ark. L. Rev. Uniform Commercial Code — Buyers' Remedies After Acceptance, 20 Ark. L. Rev. 409.

Torts — Strict Liability in Products Cases, 22 Ark. L. Rev. 796.

The Return of Caveat Venditor as the

Law of Products Liability, 23 Ark. L. Rev. 355.

Legislative Note — Act 111 of 1973: An Act to Impose Liability for Injury and Damages Done in Certain Circumstances by Defective Products, 27 Ark. L. Rev. 562.

The Personal Injury Action in Warranty — Has the Arkansas Strict Liability Statute Rendered It Obsolete? 28 Ark. L. Rev. 335.

Voucher to Products Liability: The Mechanics of U.C.C. § 2-607 (5) (a), 29 Ark. L. Rev. 486.

CASE NOTES

ANALYSIS

Purpose.

Goods accepted.

Notice of breach.

Remedy barred.

Third party actions.

Voluntary payment rule.

Purpose.

The purpose of the statutory notice requirement of a breach is twofold: first, it gives the seller an opportunity to minimize damages in some way, such as by correcting the defect; second, it gives immunity to a seller against stale claims. *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994).

Goods Accepted.

Seller could not rely on this section to argue that buyer had the burden of proving that seller had not substantially performed under the contract where the goods at issue were not accepted by buyer. *TEC Floor Corp. v. Wal-Mart Stores, Inc.*, 4 F.3d 599 (8th Cir. 1993).

Notice of Breach.

The buyer of a combine with tires too narrow for use in his fields but which the seller assured him would give him satisfaction, was barred from any remedy unless he notified the seller of the breach of warranty within a reasonable time after discovery that the combine would not work in his fields. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

The purpose of the statutory requirement of notice to the seller of breach of

warranty is to enable the seller to minimize damages in some way such as correcting the defect and also to give the seller some immunity against stale claims. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

The sufficiency of notice to the seller of breach of warranty and what is considered a reasonable time to give such notice are ordinarily questions of fact for the jury based on the circumstances of each case. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

Notice to the seller of breach of warranty is a condition precedent to recovery and must be alleged in the complaint. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

Notice to seller held to be timely and sufficient. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971); *Chemco Indus. Applicators Co. v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973); *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Lessee of equipment failed to give lessor notification of breach of warranty within a reasonable time, and thereby lost rights under any express or implied warranty. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. 1972).

Written notice is not required for a breach of warranty claim by the Code. *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 558 S.W.2d 147 (1977).

The intent of subdivision (3)(a) of this section is that the seller be notified that the buyer proposes to look to him for damages, which notice must either di-

rectly or inferentially inform the seller that the buyer demands damages upon an asserted claim of breach of warranty. *James A. Rogers Excavating, Inc. v. R.A. Young & Son*, 3 Ark. App. 297, 625 S.W.2d 560 (1981).

The standard of notification set out in this section was a reasonable one to be applied in claims of breach of implied warranty of habitability as to new house; the buyer is not required to list each and every objection that he would rely on as constituting the breach; notification need only be with sufficient clarity to apprise the vendor-builder that a breach of implied warranty is being asserted and to give him sufficient opportunity to inspect the premises and correct the defects; the sufficiency of the notice and whether it was given within a reasonable time are ordinarily questions of fact for a jury to determine. *Pickler v. Fisher*, 7 Ark. App. 125, 644 S.W.2d 644 (1983).

Where the buyer pled notice of the seller's breach of warranty, and counsel for the seller conceded this point in oral argument, the seller was not entitled to a directed verdict on the basis of the buyer's alleged failure to provide notice. *Greenfield Seed Co. v. Bland*, 18 Ark. App. 48, 710 S.W.2d 833 (1986).

Where there was sufficient evidence that notice of damage was, at the very least, inferentially given by the seed buyer to the seller, and the buyer filed his counterclaim seeking damages in May following the harvest, which was possibly the first time that the buyer could, with any degree of certainty, ascertain his damages, whether such notice of the seller's breach of warranty was sufficient and reasonable as to time, form, and substance was a question of fact properly submitted to the jury for its determination, and the trial court did not abuse its discretion in denying the seller's motion for a directed verdict. *Greenfield Seed Co. v. Bland*, 18 Ark. App. 48, 710 S.W.2d 833 (1986).

Where material questions of fact remained regarding issue of whether defendant was given notice of its breach of warranty, defendant was not entitled to summary judgment on that issue. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

For breach of warranty, no particular

form of notice to the seller is required, and the notice need not be in writing. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

The giving of reasonable notice is a condition precedent to recovery under the provisions of the commercial code, and the giving of notice must be alleged in the complaint in order to state a cause of action; the complaint cannot be the notice. *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994).

Remedy Barred.

Where buyer made payment on two remaining notes on purchase price after discovering alleged defect, used the machine for over three years and made no effort to return it and rescind the sale, he was not entitled to recover damages on the theory that the warranty was breached. *Continental Moss-Gordin, Inc. v. Beaton*, 247 Ark. 426, 446 S.W.2d 226 (1969).

Third Party Actions.

In an action by a third party for damages resulting from an automobile collision alleged to have resulted from defective brakes on the automobile, any error in dismissing the action as to the dealer became harmless when the jury found for the manufacturer, where the defect was latent and could have been discovered only by complete disassembly of the defective brake. *Smith v. Goble*, 248 Ark. 415, 452 S.W.2d 336 (1970).

Voluntary Payment Rule.

Where there was a contract for the sale of goods and buyer accepted the goods, this section made buyer responsible for payment, and this legal duty to pay rendered the voluntary-payment rule inapplicable. *TB of Blytheville, Inc. v. Little Rock Sign & Emblem, Inc.*, 328 Ark. 688, 946 S.W.2d 930 (1997).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974); *Cotner v. International Harvester Co.*, 260 Ark. 885, 545 S.W.2d 627 (1977); *Bailey v. Matthews*, 279 Ark. 117, 649 S.W.2d 175 (1983); *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989); *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923 (8th Cir. 1999).

4-2-608. Revocation of acceptance in whole or in part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

History. Acts 1961, No. 185, § 2-608; A.S.A. 1947, § 85-2-608.

RESEARCH REFERENCES

ALR. Substantial impairment entitling buyer to revoke his acceptance of goods under UCC § 2-608(1). 38 ALR 5th 191.

Ark. L. Notes. Looney, The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and the Uniform Commercial Code, 1990 Ark. L. Notes 75.

Ark. L. Rev. Uniform Commercial Code — Buyers' Remedies After Acceptance, 20 Ark. L. Rev. 409.

Legislative Note — Act 462 of 1973: Three Day "Cooling-Off" Period for Home

Solicitation Sales, 27 Ark. L. Rev. 571.

Commercial Law — The Effect of the Seller's Right to Cure on the Buyer's Remedy of Rescission, 28 Ark. L. Rev. 297.

Notes, Ozark Kenworth, Inc. v. Neidecker: A Buyer's Continued Use of Goods After Revocation of Acceptance, 38 Ark. L. Rev. 857.

UALR L.J. Note, Arkansas's New Motor Vehicle Quality Assurance Act — A Branch of Hope For Lemon Owners, 16 UALR L.J. 493.

CASE NOTES**ANALYSIS**

Cure of defects.

Evidence.

Guarantees.

Nonconforming goods.

Nonconforming goods.

Questions of fact.

Remedies.

Rescission.

Return of defective goods.

Substantial impairment of value.

Time of revocation.

Use of goods.

Cure of Defects.

The seller does not have an unlimited

time within which to cure the nonconformity; it must be cured seasonably. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Evidence supported finding that the buyers had not afforded the manufacturer a reasonable time to cure defects in mobile home. *Rhode v. Kremer*, 280 Ark. 136, 655 S.W.2d 410 (1983).

Evidence.

Upon the evidence presented, there was no revocation of acceptance under this section. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), overruled on other grounds by

Stimson Tractor Co. v. Heflin, 257 Ark. 263, 516 S.W.2d 379 (1974).

Question of whether buyer was entitled to revoke acceptance of truck based on seller's assurances that any nonconformity would be seasonably cured should have been presented to jury where evidence presented factual issue as to the existence of a latent defect in the truck and the making of repairs and assurances by the seller to the effect that the truck was repairable. *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972).

Evidence sufficient to support revocation of acceptance of a mobile home on nonconforming product grounds. *Frontier Mobile Home Sales, Inc. v. Trigleth*, 256 Ark. 101, 505 S.W.2d 516 (1974).

Guarantees.

A guarantee may have limited the seller's other warranties provided for by this chapter, but it in no way can be construed to have foreclosed a buyer's right to revoke her acceptance within a reasonable time of the discovery of nonconformity of the goods. *O'Neal Ford, Inc. v. Earley*, 13 Ark. App. 189, 681 S.W.2d 414 (1985).

Nonconforming Goods.

The concept of nonconformity includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract; it is thus apparent that breach of warranty and nonconformity are not entirely congruent concepts, the former being a subset of the latter. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

A buyer's right to revoke his acceptance of goods is conditioned upon the nonconforming character of the goods; if goods conform to the contract and the buyer has accepted them, the buyer does not have a right to revoke his acceptance. *Watson v. Miears*, 772 F.2d 433 (8th Cir. 1985).

Nonconforming Goods.

The plaintiff properly revoked its acceptance of 521 out of 828 cases of frozen chicken where the plaintiff's representatives testified that the defendant assured them that the chicken was all split breasts and no more than 6 to 8 months old and it was later discovered that 521 of the cases were pieces, rather than split breasts, and were over a year old. *Grand State Mktg. v. Eastern Poultry Distribs.*, 63 Ark. App. 123, 975 S.W.2d 439 (1998).

Questions of Fact.

The question whether goods are nonconforming and whether a revocation of acceptance was given within a reasonable time are questions of fact. *O'Neal Ford, Inc. v. Earley*, 13 Ark. App. 189, 681 S.W.2d 414 (1985).

Whether goods are conforming is a question of fact. *Watson v. Miears*, 772 F.2d 433 (8th Cir. 1985).

Remedies.

A buyer is not required to elect between revocation of acceptance and recovery of damages for breach of warranty. *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

The buyer's options of revocation of acceptance under § 4-2-711 and recovery of damages for breach of warranty under § 4-2-714 are two separate and distinct strands of remedies under the UCC (subtitle 1 of this title) and the buyer may pursue either remedy or both since they offer separate forms of relief. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Buyer was not permitted the return of its purchase price in addition to retaining purchased equipment under a breach of contract or breach of warranty theory. *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989).

If the buyer does not reject the goods or timely revoke acceptance, he will be obligated to pay the balance due on the contract price and will be limited to the recovery of damages for breach of warranty. *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989).

Rescission.

The purchaser of a vending machine business upon the seller's representation as to past profits did not waive his right to rescind the purchase for fraud in such representations by making two installment payments on the purchase price after he discovered profits were substantially less than as represented by the seller where the seller assured him that business would improve if given time, especially with the arrival of summer. *Parker v. Johnston*, 244 Ark. 355, 426 S.W.2d 155 (1968).

Action to rescind contract on grounds of nonconformity should be treated as "revo-

cation of acceptance" under this section, since the Uniform Commercial Code does not use, in most instances, the term "rescission" and the terms amount to the same thing under the Code. *Hughes v. Brown*, 1 Ark. App. 171, 613 S.W.2d 848 (1981).

Return of Defective Goods.

Buyer's refusal to tender return of drilling rig when he filed complaint to obtain revocation of sale and his continued refusal to return pipe and other accessories did not prevent him from revoking his acceptance, as tender of goods purchased is not a condition of rescission under this section. *Snow v. C.I.T. Corp. of S., Inc.*, 278 Ark. 554, 647 S.W.2d 465 (1983).

This section does not specifically state that revoked goods are to be returned to the seller; however, the comments to this section assume the goods will be returned. *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989).

Substantial Impairment of Value.

Where a farmer bought a tractor for use at certain times of the year and to cope with certain soil and weather conditions, but the farmer was deprived of the use of the tractor during those critical periods due to a combination of factory and service-related defects, the tractor's nonconformity under the sales contract substantially impaired the value of the tractor to the farmer and was sufficient to warrant the farmer's revocation of acceptance. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Where drilling rig, purchased upon seller's representation that it was superior to older model, proved to be slower than old model, was constantly in need of repairs and needed major modifications dealing with operational efficiency, buyer was entitled to revoke his acceptance of rig because its nonconformity substantially impaired its value to him. *Snow v. C.I.T. Corp. of S., Inc.*, 278 Ark. 554, 647 S.W.2d 465 (1983).

Time of Revocation.

Revocation held to have been made within a reasonable time. *Frontier Mobile Home Sales, Inc. v. Trigleth*, 256 Ark. 101, 505 S.W.2d 516 (1974); *Hughes v. Brown*, 1 Ark. App. 171, 613 S.W.2d 848 (1981); *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Revocation held not to be within a reasonable time. *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

Consumers rightfully revoked acceptance of an automobile purchase contract, and were properly awarded both compensatory and punitive damages, even though they had been driving the car almost two years, where the revocation occurred immediately after the consumers discovered that the car, sold as new, had previously been in a wreck and repainted. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Use of Goods.

Continued attempts of a buyer to use a combine with tires too narrow for use in his fields, although assured by the seller that it would give him satisfaction, and procurement of repairs on the combine by the seller's employees after his discovery that the combine was not suited for use in his fields, amounted to an exercise of ownership over the combine inconsistent with revocation of his acceptance of the machine. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

A waiver does not necessarily result when a buyer continues to use an article following repairs by the seller. *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972).

In action by seller of panels for price of last shipment in which buyer counterclaimed for damages caused by the fact that the panels were of a lighter weight than that ordered, the issue was not acceptance or rejection, but revocation of acceptance, and use of the last shipment despite knowledge of its unsuitability did not bar counterclaim for damages for nonconformity of the original shipment. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

The continued use of the goods by a buyer does not necessarily cancel a prior rejection where the seller had wrongfully refused to accept the buyer's rightful rejection; the issue of waiver of revocation is determined on a case by case basis, with the reasonableness of post-revocation use being the underlying consideration, taken in conjunction with a consideration of all the other elements necessary to effect a justifiable revocation. *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Dopieralla v. Arkansas La. Gas Co.*, 255 Ark. 150, 499 S.W.2d 610 (1973); *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979);

McFall Chevrolet Co. v. Collins, 271 Ark. 469, 609 S.W.2d 118 (1980); *Mitcham v. First State Bank*, 333 Ark. 598, 970 S.W.2d 267 (1998).

4-2-609. Right to adequate assurance of performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty (30) days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

History. Acts 1961, No. 185, § 2-609; A.S.A. 1947, § 85-2-609.

RESEARCH REFERENCES

ALR. What constitutes "reasonable grounds for insecurity" justifying demand for adequate assurance of performance under UCC § 2-609. 37 ALR 5th 459.

Ark. L. Notes. Flaccus, A Grab Bag of Recent Arkansas Cases, 1999 Ark. L. Notes 25.

Ark. L. Rev. Recent Developments, *Ford Motor Credit Co. V. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (Ark. 1998), 51 Ark. L. Rev. 853.

CASE NOTES

ANALYSIS

Demand.
Vehicle sales contract.

Demand.

A demand for adequate assurance of performance may only be made by one party to a sales contract upon the other party if there are reasonable grounds for insecurity that the other party will not perform his or her contractual obligation. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998).

Vehicle Sales Contract.

The plaintiff lender did not have reasonable grounds to make a demand in connection with an automobile loan where (1) the automobile was seized in connection with the arrest of the owner's husband for a drug offense, but was then released to the plaintiff, (2) although the owner began making late payments after the seizure of the automobile, the plaintiff accepted the payments and merely added extra fees, and (3) the owner was only past due for one payment. *Ford Motor Credit*

Co. v. Ellison, 334 Ark. 357, 974 S.W.2d 464 (1998).

4-2-610. Anticipatory repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (§ 4-2-703 or § 4-2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this chapter on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (§ 4-2-704).

History. Acts 1961, No. 185, § 2-610; A.S.A. 1947, § 85-2-610.

CASE NOTES

ANALYSIS

Construction.
Partial repudiation.
Remedies.

Construction.

The phrase "substantially impair" as used in this section requires the factfinder to look at the materiality of a party's repudiation as it relates to the entire contract. *Cargill, Inc. v. Storms Agri Enters., Inc.*, 46 Ark. App. 237, 878 S.W.2d 786 (1994).

Partial Repudiation.

When a party repudiates as to a single installment or performance, it is incumbent on the party seeking damages under this section to prove the value of the

contract as a whole was substantially impaired to justify his resort to his remedies for breach. *Cargill, Inc. v. Storms Agri Enters., Inc.*, 46 Ark. App. 237, 878 S.W.2d 786 (1994).

Remedies.

Where contractor repudiated his contract with supplier, supplier pursuant to this section could resort to any available remedy for sellers, principally damages for nonacceptance under § 4-2-708, but subsection (1) of that section was unavailable where supplier could not have then tendered performance, leaving supplier its remedy for net profits under subsection (2) of § 4-2-708. *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978).

4-2-611. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this chapter (§ 4-2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

History. Acts 1961, No. 185, § 2-611;
A.S.A. 1947, § 85-2-611.

4-2-612. "Installment contract" — Breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one (1) or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

History. Acts 1961, No. 185, § 2-612;
A.S.A. 1947, § 85-2-612.

RESEARCH REFERENCES

ALR. Construction and application of goods under installment contracts. 61 UCC § 2-612(2), dealing with rejection of ALR 5th 611.

CASE NOTES

Cited: Cargill, Inc. v. Storms Agri Enters., Inc., 46 Ark. App. 237, 878 S.W.2d 786 (1994).

4-2-613. Casualty to identified goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (§ 4-2-324) then

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

History. Acts 1961, No. 185, § 2-613;
A.S.A. 1947, § 85-2-613.

4-2-614. Substituted performance.

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

History. Acts 1961, No. 185, § 2-614;
A.S.A. 1947, § 85-2-614.

4-2-615. Excuse by failure of presupposed conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

History. Acts 1961, No. 185, § 2-615;
A.S.A. 1947, § 85-2-615.

RESEARCH REFERENCES

ALR. Impracticability of performance
of sales contract under UCC § 2-615. 55
ALR 5th 1.

CASE NOTES

Cited: Pete Smith Co. v. El Dorado, 258 Ark. 862, 529 S.W.2d 147 (1975); Jacob Hartz Seed Co. v. Coleman, 271 Ark. 756, 612 S.W.2d 91 (1981).

4-2-616. Procedure on notice claiming excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this chapter relating to breach of installment contracts (§ 4-2-612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty (30) days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except insofar as the seller has assumed a greater obligation under the preceding section.

History. Acts 1961, No. 185, § 2-616; A.S.A. 1947, § 85-2-616.

PART 7 — REMEDIES

SECTION.

- 4-2-701. Remedies for breach of collateral contracts not impaired.
- 4-2-702. Seller's remedies on discovery of buyer's insolvency.
- 4-2-703. Seller's remedies in general.
- 4-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.
- 4-2-705. Seller's stoppage of delivery in transit or otherwise.
- 4-2-706. Seller's resale including contract for resale.
- 4-2-707. "Person in the position of a seller."
- 4-2-708. Seller's damages for non-acceptance or repudiation.
- 4-2-709. Action for the price.
- 4-2-710. Seller's incidental damages.
- 4-2-711. Buyer's remedies in general — Buyer's security interest in rejected goods.
- 4-2-712. "Cover" — Buyer's procurement of substitute goods.

SECTION.

- 4-2-713. Buyer's damages for nondelivery or repudiation.
- 4-2-714. Buyer's damages for breach in regard to accepted goods.
- 4-2-715. Buyer's incidental and consequential damages.
- 4-2-716. Buyer's right to specific performance or replevin.
- 4-2-717. Deduction of damages from the price.
- 4-2-718. Liquidation or limitation of damages — Deposits.
- 4-2-719. Contractual modification or limitation of remedy.
- 4-2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.
- 4-2-721. Remedies for fraud.
- 4-2-722. Who can sue third parties for injury to goods.
- 4-2-723. Proof of market price — Time and place.
- 4-2-724. Admissibility of market quotations.

SECTION.

4-2-725. Statute of limitations in contracts for sale.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout

the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

ALR. Application, to security aspects of sales contract, of UCC § 2-725 limiting time for bringing action. 16 ALR 4th 1335.

Actions for personal injuries based on breach of implied warranty under provisions governing sales (UCC § 2-725(1)). 20 ALR 4th 915.

Specific performance of sale of goods under UCC § 2-716. 26 ALR 4th 294.

Unconscionability of disclaimer of warranties or limitation or exclusion of dam-

ages, under UCC § 2-302 or § 2-719(3), in contract subject to UCC Article 2. 38 ALR 4th 25.

What constitutes cover upon breach by seller under UCC § 2-712(1). 79 ALR 4th 844.

Causes of action governed by limitations period in UCC § 2-725. 49 ALR 5th 1.

Am. Jur. 67A Am. Jur. 2d, Sales, § 853 et seq.

4-2-701. Remedies for breach of collateral contracts not impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this chapter.

History. Acts 1961, No. 185, § 2-701; A.S.A. 1947, § 85-2-701.

4-2-702. Seller's remedies on discovery of buyer's insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods there-

tofore delivered under the contract, and stop delivery under this chapter (§ 4-2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this chapter (§ 4-2-403). Successful reclamation of goods excludes all other remedies with respect to them.

History. Acts 1961, No. 185, § 2-702; 1967, No. 303, § 4; A.S.A. 1947, § 85-2-702.

RESEARCH REFERENCES

Ark. L. Rev. The Trustee in Bankruptcy and the Secured Creditor, 17 Ark. L. Rev. 46.

CASE NOTES

ANALYSIS

Bankruptcy.
Security interests.

Bankruptcy.

Where claimant's oral demand complied with state law and bankruptcy was filed after the 10 day time limit for demanding reclamation had expired, the additional requirement of the Bankruptcy Code became effective too late for the claimant to comply with it. To retroactively apply the written requirement of the Bankruptcy Code would result in subjecting the reclaiming seller to a procedure different from the procedure applicable at the time the act to be done was required to be done, and this would be inconsistent with fun-

damental principles of due process of law. Thus failure to make written demand as required by the Bankruptcy Code results only in claimant's right to reclaim being subject to the avoiding powers of the trustee. *Farmers Rice Milling Co. v. Hawkins* (In re Bearhouse, Inc.), 84 Bankr. 552 (Bankr. W.D. Ark. 1988).

Security Interests.

If the secured party has all the prerequisites of a good faith purchaser for value with a valid security interest in the debtor's after-acquired inventory, the secured party's security interest defeats the equitable rights of the reclaiming sellers. *Beebe v. MacMillan Petro. (Ark.), Inc.*, 115 Bankr. 175 (Bankr. W.D. Ark. 1990).

4-2-703. Seller's remedies in general.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (§ 4-2-612), then also

with respect to the whole undelivered balance, the aggrieved seller may:

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (§ 4-2-705);
- (c) proceed under § 4-2-704 respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (§ 4-2-706);
- (e) recover damages for nonacceptance (§ 4-2-708) or in a proper case the price (§ 4-2-709);
- (f) cancel.

History. Acts 1961, No. 185, § 2-703;
A.S.A. 1947, § 85-2-703.

RESEARCH REFERENCES

Ark. L. Rev. Brill, The Election of Remedies Doctrine in Arkansas, 37 Ark. L. Rev. 385.

CASE NOTES

ANALYSIS

Cancellation.
Damages.

Cancellation.

The defendant had a statutory right to cancel any contract with the plaintiff to deliver goods for resale where the plaintiff was more than \$200,000 in arrears on payments to the defendant for goods previously delivered. *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923 (8th Cir. 1999).

Damages.

Where goods were accepted under § 4-

2-606(1)(b), plaintiffs in breach of contract action were entitled to recover the unpaid balance of the contract price under provisions of § 4-2-709(1)(a) and defendant's breach of the contract which triggered seller's remedy under subsection (a) of this section included the right to recover damages for nonacceptance. *Watson v. Mears*, 612 F. Supp. 1235 (W.D. Ark. 1984), *aff'd*, 772 F.2d 433 (8th Cir. 1985).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978).

4-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

History. Acts 1961, No. 185, § 2-704;
A.S.A. 1947, § 85-2-704.

4-2-705. Seller's stoppage of delivery in transit or otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (§ 4-2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

History. Acts 1961, No. 185, § 2-705;
A.S.A. 1947, § 85-2-705.

4-2-706. Seller's resale including contract for resale.

(1) Under the conditions stated in § 4-2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this chapter (§ 4-2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at a public or private sale including sale by way of one (1) or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one (1) or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (§ 4-2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (§ 4-2-711(3)).

History. Acts 1961, No. 185, § 2-706;
A.S.A. 1947, § 85-2-706.

RESEARCH REFERENCES

UALR L.J. White, The Decline of the
Contract Market Damage Model, 11
UALR L.J. 1.

CASE NOTES

ANALYSIS

Commercial reasonableness.
Complaint.
Damages.
Notice.

Commercial Reasonableness.

Where seller alleged in its complaint that it had made reasonable efforts to resell the bulldozer and where buyer in his motion for directed verdict stated that the resale was not commercially reason-

able, the issue of commercial reasonableness of the resale was sufficiently raised at trial for determination of the issue on appeal. *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976).

Where, following buyer's alleged breach of contract for sale of a bulldozer, seller made no effort to resell the equipment for in excess of 14 months, the delay was commercially unreasonable. *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976).

Complaint.

Where seller, whose original complaint had sought recovery for the full purchase price and had alleged unsuccessful efforts to resell, was permitted to amend his complaint on the day before trial to the effect that the equipment was sold and seller sought damages, the trial court did not abuse its discretion in absence of proof that buyer's rights were materially prejudiced. *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976).

Damages.

Where, based on the evidence, the buyer had received notice of seller's intention to resell the equipment and thus the measure of damages provided in this section was applicable. *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976).

Notice.

The purchaser was entitled to a reasonable notice of the seller's intention to resell a television placed in layaway upon a down payment with conflicting evidence as to when the purchaser was to take delivery of the set and where, long after the time when the seller testified delivery was to be taken, the purchaser informed the seller he was not yet ready for delivery and was assured by the seller that the set was in storage. *Wood v. Downing*, 243 Ark. 120, 418 S.W.2d 800 (1967).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

4-2-707. "Person in the position of a seller."

(1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this chapter withhold or stop delivery (§ 4-2-705) and resell (§ 4-2-706) and recover incidental damages (§ 4-2-710).

History. Acts 1961, No. 185, § 2-707; A.S.A. 1947, § 85-2-707.

4-2-708. Seller's damages for non-acceptance or repudiation.

(1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (§ 4-2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (§ 4-2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable

overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (§ 4-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

History. Acts 1961, No. 185, § 2-708;
A.S.A. 1947, § 85-2-708.

RESEARCH REFERENCES

UALR L.J. White, The Decline of the
Contract Market Damage Model, 11
UALR L.J. 1.

CASE NOTES

Measure of Damages.

Where contractor repudiated his contract with supplier, supplier pursuant to § 4-2-610 could resort to any available remedy for sellers, principally damages for nonacceptance under this section, but subsection (1) of this section was unavailable where supplier could not have then

tendered performance, leaving supplier its remedy for net profits under subsection (2) of this section. *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978).

Cited: *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. 1977).

4-2-709. Action for the price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (§ 4-2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

History. Acts 1961, No. 185, § 2-709;
A.S.A. 1947, § 85-2-709.

RESEARCH REFERENCES

Ark. L. Rev. Paulson, Survey of Arkansas Law: Business Law, 2 UALR L.J. 161.

CASE NOTES

ANALYSIS

Accepted goods.
Complaint.

Accepted Goods.

Where the buyer had ample opportunity to inspect the goods and at no time indicated that the goods would not be accepted, the goods were deemed to have been accepted under § 4-2-606(1)(b) and the seller was therefore entitled to recover the unpaid balance of the contract price under subsection (1)(a) of this section. *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. 1977).

Where defendant had an opportunity to inspect the goods and the goods were accepted under § 4-2-606(1)(b), plaintiffs in breach of contract action were entitled to recover the unpaid balance of the contract price under provisions of subdivision

(1)(a) of this section, and defendant's breach of the contract which triggered seller's remedy under § 4-2-703(a) included the right to recover damages for nonacceptance. *Watson v. Mears*, 612 F. Supp. 1235 (W.D. Ark. 1984), *aff'd*, 772 F.2d 433 (8th Cir. 1985).

Complaint.

Where seller, whose original complaint had sought recovery for the full purchase price and had alleged unsuccessful efforts to resell, was permitted to amend his complaint on the day before trial to the effect that the equipment was sold and seller sought damages, the trial court did not abuse its discretion in absence of proof that buyer's rights were materially prejudiced. *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976).

4-2-710. Seller's incidental damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

History. Acts 1961, No. 185, § 2-710; A.S.A. 1947, § 85-2-710.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 10 UALR L.J. 89.

4-2-711. Buyer's remedies in general — Buyer's security interest in rejected goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 4-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this chapter (§ 4-2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this chapter (§ 4-2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this chapter (§ 4-2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (§ 4-2-706).

History. Acts 1961, No. 185, § 2-711; A.S.A. 1947, § 85-2-711.

RESEARCH REFERENCES

Ark. L. Rev. Commercial Law — The Effect of the Seller's Right to Cure on the Buyer's Remedy of Rescission, 28 Ark. L. Rev. 297.

UALR L.J. Note, Arkansas's New Motor Vehicle Quality Assurance Act — A Branch of Hope For Lemon Owners, 16 UALR L.J. 493.

CASE NOTES

ANALYSIS

In general.

Cover.

Damages.

Justifiable revocation.

In General.

The buyer's options of revocation of acceptance under this section and recovery of damages for breach of warranty under § 4-2-714 are two separate and distinct strands of remedies under the UCC and the buyer may pursue either remedy or both since they offer separate forms of relief. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

When both fraud and breach of contract are pled, a buyer may pursue, but not recover, both revocation of acceptance and damages for breach of warranty. *Roach v. Concord Boat Corp.*, 317 Ark. 474, 880 S.W.2d 305 (1994).

Cover.

Where buyer chooses to purchase sub-

stitute goods, its remedy is limited to that of § 4-2-712, unless the purchase does not constitute "cover." *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Damages.

Upon repudiation of contract for sale of farm equipment, party who did not repudiate was entitled to cancel the contract and recover his purchase price as well as incidental and consequential damages. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

The correct measure of damages on cancellation of a contract for nonconformity was a refund of payments made and not the difference between the value of the goods accepted and the value they would have had if they had been as warranted. *Frontier Mobile Home Sales, Inc. v. Triglenth*, 256 Ark. 101, 505 S.W.2d 516 (1974).

Justifiable Revocation.

Under the UCC, once goods are ac-

cepted buyer is entitled to cancel the contract and recover so much as has been paid only upon establishing that he has justifiably revoked his acceptance. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Where a farmer bought a tractor for use at certain times of the year and to cope with certain soil and weather conditions, but the farmer was deprived of the use of the tractor during those critical periods due to a combination of factory and service-related defects, the tractor's noncon-

formity under the sales contract substantially impaired the value of the tractor to the farmer and was sufficient to warrant the farmer's revocation of acceptance. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979); *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980); *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989).

4-2-712. "Cover" — Buyer's procurement of substitute goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 4-2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

History. Acts 1961, No. 185, § 2-712; A.S.A. 1947, § 85-2-712.

RESEARCH REFERENCES

ALR. What constitutes "cover" upon breach by seller under UCC § 2-712(1). 79 ALR 4th 844.

UALR L.J. White, The Decline of the Contract Market Damage Model, 11 UALR L.J. 1.

CASE NOTES

ANALYSIS

Damages.
Failure to cover.
Incidental or consequential damages.
Substitute goods.

Damages.

Any incidental and consequential damages stemming from a breach in regard to accepted goods may be recovered, and since the difference in the cost of the original and replacement trusses could be a proper element of such consequential damages, the court was correct in its admission of the evidence of cost of the replacements. *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979).

Failure to Cover.

In an action upon repudiation of a contract for sale of farm equipment, failure to "cover" is not a bar to recovery of consequential damages unless the loss could have reasonably been prevented by cover or otherwise. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

Incidental or Consequential Damages.

Incidental or consequential damages are recoverable items of damages under both this section and § 4-2-713. Subject to the evidentiary rules of admissibility, evidence relating to both items is admissible. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Substitute Goods.

Where buyer chooses to purchase substitute goods, its remedy is limited to that of this section, unless the purchase does not constitute "cover." *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971); *Tenwick v. Byrd*, 9 Ark. App. 340, 659 S.W.2d 950 (1983).

4-2-713. Buyer's damages for nondelivery or repudiation.

(1) Subject to the provisions of this chapter with respect to proof of market price (§ 4-2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (§ 4-2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

History. Acts 1961, No. 185, § 2-713; A.S.A. 1947, § 85-2-713.

RESEARCH REFERENCES

UALR L.J. White, The Decline of the Contract Market Damage Model, 11 UALR L.J. 1.

CASE NOTES**ANALYSIS**

Incidental or consequential damages.
Market price.

Incidental or Consequential Damages.

Consequential damages would include loss resulting from the particular needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

Incidental or consequential damages are recoverable items of damages under both § 4-2-712 and this section. Subject to the evidentiary rules of admissibility, evidence relating to both items is admissible. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Market Price.

When the current market price is diffi-

cult to prove or is not readily available, the court is granted reasonable leeway in receiving evidence of current prices in other comparable markets or at other times comparable to the one in question. *Chappell Chevrolet, Inc. v. Strickland*, 4 Ark. App. 108, 628 S.W.2d 25 (1982).

The trial court did not abuse its discretion in permitting the buyer to testify to a national price for limited issue automobile in order to establish the market price of the automobile at the time of the seller's breach, where the limited number of the automobiles made it difficult to prove a market price in a given geographic location, and where the buyer's national price was based on sales of those automobiles in at least nine states. *Chappell Chevrolet, Inc. v. Strickland*, 4 Ark. App. 108, 628 S.W.2d 25 (1982).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Paymaster*

Oil Mill Co. v. Weston, 610 F.2d 501 (8th Cir. 1979); Herrick v. Robinson, 267 Ark. 576, 595 S.W.2d 637 (1980).

4-2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (§ 4-2-607(3)) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

History. Acts 1961, No. 185, § 2-714; A.S.A. 1947, § 85-2-714.

RESEARCH REFERENCES

Ark. L. Rev. Unconscionable Contracts: A New Approach for the Arkansas Lawyer, 21 Ark. L. Rev. 427.

Voucher to Products Liability: The Mechanics of U.C.C. § 2-607(5)(a), 29 Ark. L. Rev. 486.

Notes, Ozark Kenworth, Inc. v. Neidecker: A Buyer's Continued Use of Goods After Revocation of Acceptance, 38 Ark. L. Rev. 857.

UALR L.J. White, The Decline of the Contract Market Damage Model, 11 UALR L.J. 1.

Note, Arkansas's New Motor Vehicle Quality Assurance Act — A Branch of Hope For Lemon Owners, 16 UALR L.J. 493.

CASE NOTES

ANALYSIS

In general.

Applicability.

Damages.

—Incidental and consequential damages.

—Loss of profits.

—Lost time.

—Measure.

Failure to give notice.

Nonconformities.

Use of goods.

In General.

The buyer's options of revocation of acceptance under § 4-2-711 and recovery of damages for breach of warranty under this section are two separate and distinct

strands of remedies under the UCC (sub-title 1 of this title), and the buyer may pursue either remedy or both since they offer separate forms of relief. Ford Motor Credit Co. v. Harper, 671 F.2d 1117 (8th Cir. 1982).

When both fraud and breach of contract are pled, a buyer may pursue, but not recover, both revocation of acceptance and damages for breach of warranty. Roach v. Concord Boat Corp., 317 Ark. 474, 880 S.W.2d 305 (1994).

Applicability.

This section is applicable to cases where breach is of an implied warranty of fitness for a particular purpose. Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971).

Damages.

Where buyer made payment on two remaining notes on purchase price, after discovering alleged defect, and used machine for over three years and made no effort to return it and rescind sale, and offered no evidence of damages, he was not entitled to recover damages on theory that machine was defective and that warranty was breached. *Continental Moss-Gordin, Inc. v. Beaton*, 247 Ark. 426, 446 S.W.2d 226 (1969).

—Incidental and Consequential Damages.

Consequential damages or anticipated profits cannot be recovered, as in the instance of diminished crop yield, unless the evidence establishes the alleged damages with reasonable certainty. *Traylor v. Huntsman*, 253 Ark. 704, 488 S.W.2d 30 (1972).

Any incidental and consequential damages stemming from a breach in regard to accepted goods may be recovered, and since the difference in the cost of the original and replacement trusses could be a proper element of such consequential damages, the court was correct in its admission of the evidence of cost of the replacements. *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979).

—Loss of Profits.

Damages, under this section and § 4-2-715, for supply of improper oil to use in hydraulic system in saw mill included direct expenses and loss of profits for period during which the oil was used but did not include loss of profits occurring after plaintiff stopped using the oil and where this loss was due to plaintiff's lack of capital resources. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

—Lost Time.

The buyer of a computer-assisted electrocardiographic system was not entitled to an award of damages for "lost time" which represented the time an employee was away from his other duties because of the increased time spent with the computer system due to its failure to operate as warranted, where there was no evidence that the employee requested payment for the special services or that the parties intended such a payment to be made. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

—Measure.

In a suit based on misrepresentation as to the condition of a purchased car, compensatory damages based on the difference in the market value of the car as warranted and its value as a wrecked car was the proper measure of damages. *Union Motors, Inc. v. Phillips*, 241 Ark. 857, 410 S.W.2d 747 (1967).

Where there was no substantial evidence in the record as to value of machinery as delivered, trial court did not err in holding that evidence was insufficient to award damages for breach of warranty based on difference between market value of machine and the price paid. *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969).

Where the trial court awarded damages on the basis of the difference at the time and place of acceptance between the value of goods accepted and the value which they would have had as warranted, the award was erroneous because the value to be considered was the reasonable market value of the goods delivered and not the value of the goods to a particular purchaser or for a particular purpose. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. 1972).

The measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have if they had been as warranted. *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 558 S.W.2d 147 (1977); *Walker Ford Sales v. Gaither*, 265 Ark. 275, 578 S.W.2d 23 (1979).

Court properly determined damages in action on contract for sale of timber rights. *Williams v. J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982).

A buyer cannot recover his down payment under a breach of warranty claim. *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989).

If the jury found for the buyer on the question of liability, they must fix the amount of money that would reasonably compensate him for the reasonable expense of necessary repairs to any property which was damaged, if the damage was proximately caused by the breach of the implied warranties by seller, given the relationship between subsections (2) and (3) of this section and § 4-2-715(1) and (2)(b). *F.L. Davis Bldrs. Supply, Inc. v.*

Knapp, 42 Ark. App. 52, 853 S.W.2d 288 (1993).

Failure to Give Notice.

Buyer was not entitled to an award of damages under either this section or § 4-2-715 since the buyer failed to give notice of the alleged breach to the seller within a reasonable time after the buyer discovered or should have discovered the breach. *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980).

Nonconformities.

The concept of nonconformity includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract; it is thus apparent that breach of warranty and nonconformity are not entirely congruent concepts, the former being a subset of the latter. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

The concept of nonconformity includes not only breaches of warranties but also any failure of the seller to perform accord-

ing to his obligations under the contract. *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989).

Use of Goods.

Use of the last shipment of goods despite knowledge of its unsuitability did not bar counterclaim for damages for nonconformity of the original shipment. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

Cited: *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969); *McKnight v. Bellamy*, 248 Ark. 27, 449 S.W.2d 706 (1970); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971); *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974); *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984); *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984); *Precision Steel Whse., Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993).

4-2-715. Buyer's incidental and consequential damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include:

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

History. Acts 1961, No. 185, § 2-715; A.S.A. 1947, § 85-2-715.

RESEARCH REFERENCES

Ark. L. Notes. Smolla, What Types of Losses are Recoverable Under Arkansas's Products Liability Law, 1984 Ark. L. Notes 11.

Ark. L. Rev. Contracts — Damages — The Tacit Agreement Doctrine in Arkansas, 18 Ark. L. Rev. 169.

Voucher to Products Liability: The Mechanics of U.C.C. § 2-607(5)(a), 29 Ark. L. Rev. 486.

Notes, *Ozark Kenworth, Inc. v. Neidecker*: A Buyer's Continued Use of Goods After Revocation of Acceptance, 38 Ark. L. Rev. 857.

Case Note, *Stift's Jewelers v. Oliver: The Tacit Agreement Test*, etc., 40 Ark. L. Rev. 403.

UALR L.J. Survey of Arkansas Law, Business Law, 1 UALR L.J. 118.

CASE NOTES

ANALYSIS

Consequential damages.
Evidence.
Failure to give notice.
Loss of profits.
Lost time.
Particular needs.
Pleading.
Repairs.
Use of goods.

Consequential Damages.

Where drainage machinery was not delivered and assembled until around May 1, 1965, purchaser was not entitled to consequential damages for failure of 1965 soybean crops because of alleged failure of machinery to perform, and there was no evidence vendor had reason to know purchaser was relying on this machinery for 1965 soybean crop. *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969).

Judgment granting consequential damages to lessee of television equipment could not stand where award was based in part on delay in furnishing equipment and nothing in the record supported finding that lessor had guaranteed or warranted that equipment would be in operating order by particular date. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. 1972).

In an action upon repudiation by seller of a contract for sale of farm equipment, consequential damages would include loss resulting from particular needs of which the seller at time of contracting had reason to know and which could not reasonably be prevented. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

Buyer of misrepresented weed-killer was entitled to consequential damages that arose from contractual losses pursuant to the misrepresentation, and to attorney fees. *Chemco Indus. Applicators Co. v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973).

Whether an item of damage falls within subdivision (2)(a) is dependent upon fac-

tual determinations which are to be made by the trier of fact. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Consequential damages or anticipated profits may be recovered if the evidence establishes the alleged damages with reasonable certainty. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Anticipated profits may be recoverable as consequential damages if the jury finds that the losses resulted from the buyer's general or particular requirements of which the seller had reason to know and could not have been prevented by cover. *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988).

Upon failure of seller's limited remedy's essential purpose, buyer was then entitled to any of the buyer's remedies provided by the Uniform Commercial Code, and included among them are consequential damages provided in this section. *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 301 Ark. 436, 785 S.W.2d 13 (1990).

Evidence.

Evidence that buyer purchased truck for a particular purpose, that he attempted to minimize damages by substituting truck, that he always had commercial loads available, that he had a lease contract during the time the truck was "down" due to the alleged malfunctioning and that he suffered loss of profits according to his business records, was competent and admissible on issue of consequential damages. *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972).

Tractor buyer's proof of consequential damages resulting from tractor seller's alleged failure to deliver tractor hitch lacked the reasonable certainty necessary to recovery, since the evidence presented was insufficient to take the question of anticipated profits or consequential damages out of the realm of speculation and conjecture and would present to the jury an incomplete set of figures as to anti-

pated profits. *Traylor v. Huntsman*, 253 Ark. 704, 488 S.W.2d 30 (1972).

In action to revoke acceptance of drilling rig, wherein buyer did not show proof of past profits or explain failure to use other rig in order to minimize losses, denial of recovery of lost profits resulting from continual breakdowns of new drilling rig was not against the preponderance of the evidence. *Snow v. C.I.T. Corp. of S., Inc.*, 278 Ark. 554, 647 S.W.2d 465 (1983).

Failure to Give Notice.

The trial court found that the buyer had not timely rescinded the transaction, the buyer was limited to the remedies available for a breach of contract in regard to the accepted goods, and the buyer was not entitled to an award of damages under either this section or § 4-2-714 since the buyer failed to give notice of the alleged breach to the seller within a reasonable time after the buyer discovered or should have discovered the breach. *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980).

Loss of Profits.

Recovery of loss of profits due to breach of warranty must take into account different market conditions, actual production capacity, type of operation, its efficiency and all other relevant factors influencing amount of profits during the period that profits are recoverable and the years used for comparative purposes. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

Damages, under this section and § 4-2-714(2), and (3), for supply of improper oil to use in hydraulic system in saw mill included direct expenses and loss of profits for period during which the oil was used but did not include loss of profits which occurred after plaintiff stopped using the oil and where this loss was due to plaintiff's lack of capital resources. *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

Evidence supported an award for lost profits, where there was substantial evidence introduced showing that appellee suffered a loss in profits as a consequence of the breach, and there was substantial evidence presented as to the amount of its loss. The type of loss was also one that could be reasonably expected to flow from the breach. *Tremco, Inc. v. Valley Aluminum Prods. Corp.*, 38 Ark. App. 143, 831 S.W.2d 156 (1992).

Lost Time.

The buyer of a computer-assisted electrocardiographic system was not entitled to an award of damages for "lost time" which represented the time an employee was away from his other duties because of the increased time spent with the computer system due to its failure to operate as warranted, where there was no evidence that the employee requested payment for the special services or that the parties intended such a payment to be made. *Wilson v. Marquette Elecs., Inc.*, 630 F.2d 575 (8th Cir. 1980).

Particular needs.

The plaintiff was not entitled to consequential damages arising from a breach of contract for the sale of a car where he never presented evidence that, at the time of the contract, the defendants had reason to know his particular needs for the car. *Smith v. Russ*, 70 Ark. App. 23, 13 S.W.3d 920 (2000).

Pleading.

In absence of an appropriate pleading setting out basis of claim for consequential damages or any specific findings supporting such damages and describing the time period in which they occurred, award must be set aside. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. 1972).

There was no need for purchaser to plead cover in action to recover consequential damages for breach of warranty. *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974).

In the absence of allegations of any effective rejection or revocation of acceptance, purchaser was not entitled to recover purchase price and its damages were limited to the difference at the time of acceptance between the value of the merchandise had it been as warranted and its actual value. *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974).

Repairs.

If the jury found for the buyer on the question of liability, they must fix the amount of money that would reasonably compensate him for the reasonable expense of necessary repairs to any property which was damaged, if the damage was proximately caused by the breach of the implied warranties by seller, given the relationship between § 4-2-714(2), (3),

and subsections (1) and (2)(b) of this section. *F.L. Davis Bldrs. Supply, Inc. v. Knapp*, 42 Ark. App. 52, 853 S.W.2d 288 (1993).

Use of Goods.

A party is required to take reasonable steps to minimize damages, and under this principle lessee could not continue to use rejected equipment indefinitely and thereby build up consequential damages. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. 1972).

In action by seller of panels for price of last shipment in which buyer counterclaimed for damages caused by the fact that the panels were of a lighter weight than that ordered, the issue was not acceptance or rejection, but revocation of acceptance, and use of the last shipment despite knowledge of its unsuitability did not bar counterclaim for damages for nonconformity of the original shipment. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

In a breach of warranty action when the buyer uses the nonconforming goods, the mere acceptance of the goods does not bar a claim for damages due to nonconformity, when it is reasonable to use the goods without inspection. *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979).

Cited: *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969); *Continental Moss-Gordin, Inc. v. Beaton*, 247 Ark. 426, 446 S.W.2d 226 (1969); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971); *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974); *Morrow v. First Nat'l Bank*, 261 Ark. 568, 550 S.W.2d 429 (1977); *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984); *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984); *Grand State Mktg. v. Eastern Poultry Distribs.*, 63 Ark. App. 123, 975 S.W.2d 439 (1998).

4-2-716. Buyer's right to specific performance or replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

History. Acts 1961, No. 185, § 2-716; A.S.A. 1947, § 85-2-716; Acts 2001, No. 1439, § 8.

Amendments. The 2001 amendment added the last sentence in (3).

RESEARCH REFERENCES

Ark. L. Notes. Brill, Specific Performance in Arkansas, 1995 Ark. L. Notes 17.

Ark. L. Rev. Remedies — Specific Per-

formance and Long Term Supply Contracts: An Application of U.C.C. § 2-716, 30 Ark. L. Rev. 65.

CASE NOTES

Specific Performance.

The trial court's order of specific performance of a contract for the sale of a mobile home was improper since there were no allegations or proof by the purchasers that the particular mobile home in question had a unique or peculiar value or that there were any circumstances requiring specific performance of the contract; however, the purchasers were entitled to damages for the breach of the sales contract.

Pierce-Odom, Inc. v. Evenson, 5 Ark. App. 67, 632 S.W.2d 247 (1982).

While it is generally true that in order to obtain a decree of specific performance of a contract for the sale of personal property, it must be shown that the property is "unique," this rule has no applicability to real property because the law regards land as unique. *Shelton v. Keller*, 24 Ark. App. 68, 748 S.W.2d 153 (1988).

4-2-717. Deduction of damages from the price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

History. Acts 1961, No. 185, § 2-717; A.S.A. 1947, § 85-2-717.

CASE NOTES

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

4-2-718. Liquidation or limitation of damages — Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1); or

(b) in the absence of such terms, twenty percent (20%) of the value of the total performance for which the buyer is obligated under the contract or five hundred dollars (\$500), whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this chapter other than subsection (1); and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the

purpose of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this chapter on resale by an aggrieved seller (§ 4-2-706).

History. Acts 1961, No. 185, § 2-718;
A.S.A. 1947, § 85-2-718.

RESEARCH REFERENCES

Ark. L. Rev. Unconscionable Contracts and the Uniform Commercial Code, 20 Ark. L. Rev. 165.

Chaney, Comments: Utilization of Disclaimer of Warranty Clauses Under the UCC, 32 Ark. L. Rev. 772.

CASE NOTES

Cited: Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Dessert Seed

Co. v. Drew Farmers Supply, Inc., 248 Ark. 858, 454 S.W.2d 307 (1970).

4-2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this subtitle.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

History. Acts 1961, No. 185, § 2-719;
A.S.A. 1947, § 85-2-719.

RESEARCH REFERENCES

Ark. L. Notes. Smolla, What Types of Losses are Recoverable Under Arkansas's Products Liability Law, 1984 Ark. L. Notes 11.

Ark. L. Rev. Unconscionable Contracts and the Uniform Commercial Code, 20 Ark. L. Rev. 165.

The Legal Kaleidoscope — Products Liability, 21 Ark. L. Rev. 301.

Legislative Note — Act 111 of 1973: An

Act to Impose Liability for Injury and Damages Done in Certain Circumstances by Defective Products, 27 Ark. L. Rev. 562.

The Personal Injury Action in Warranty — Has the Arkansas Strict Liability Statute Rendered It Obsolete? 28 Ark. L. Rev. 335.

Comments: The "Battle" of Contract Formation Under the UCC — Win, Lose or Draw?, Chaney, 32 Ark. L. Rev. 528.

Chaney, Comments: Utilization of Disclaimer of Warranty Clauses Under the UCC, 32 Ark. L. Rev. 772.

CASE NOTES

ANALYSIS

In general.
Evidence.
Exclusive remedy.
Failure of essential purpose.
Unconscionable limitations.
Validity of limitations.

In General.

A limitation of remedies under this section restricts the remedies available to the buyer once a breach is established. *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

Evidence.

Provisions in sales contract limiting liability were admissible in breach of warranty suit not as a defense to the action, but to be considered in determining purchaser's right to consequential damages. *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974).

Exclusive Remedy.

The purpose of an exclusive remedy of replacement or repair of defective parts is to give the seller an opportunity to make the goods conforming, while limiting the risks to which he is subject, by excluding direct and consequential damages that might otherwise arise. From the point of view of the buyer, the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered. When the warrantor fails to correct the defect as promised within a reasonable time, he is liable for a breach of that warranty. *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

Failure of Essential Purpose.

Where the seller was given reasonable opportunity to correct the defect or defects, and the machinery nevertheless failed to operate as should new machinery free of defects, the limited remedy failed of its essential purpose. *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

Subsection (2) of this section is to apply whenever an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, as a result of later circumstances, operates to deprive a party of a substantial benefit of the bargain. *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

It was proper to instruct the jury on failure of essential purpose, where the evidence established that appellant was in breach of warranty. *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

A limitation of the remedy to the repair and replacement of nonconforming parts fails whenever the warrantor, given the opportunity to do so, fails to correct the defect within a reasonable period. *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 301 Ark. 436, 785 S.W.2d 13 (1990).

Upon failure of seller's limited remedy's essential purpose, buyer was then entitled to any of the buyer's remedies provided by the Uniform Commercial Code, and included among them are consequential damages provided in § 4-2-715. *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 301 Ark. 436, 785 S.W.2d 13 (1990).

The "failure of essential purpose" exception is most commonly applied when the buyer's remedy is exclusively limited to repair or replacement of defective goods, and the seller is unable to repair or replace the goods to conform to the warranty. The failure of essential purpose exception is not applicable, where the defendant has not limited plaintiff's remedy to repair or replacement of the defective goods and has only limited its liability for consequential damages. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

Unconscionable Limitations.

In an action for breach of implied warranty seeking damages for wrongful death of the driver-owner of a pickup truck alleged to have resulted from a defective axle, a warranty provision providing that

the warranty should be fulfilled by the replacement or repair of the defective part was unconscionable within the meaning of subsection (3) of this section. *Ford Motor Co. v. Tritt*, 244 Ark. 883, 430 S.W.2d 778 (1968).

The only restriction on the limitation or exclusion of consequential damages is that such limitation or exclusion cannot be unconscionable. *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972).

Absent disparity of bargaining power, and with both parties knowledgeable, a contract intentionally and clearly disclaiming liability for loss of profits was not unconscionable. *Cryogenic Equip., Inc. v. Southern Nitrogen, Inc.*, 490 F.2d 696 (8th Cir. 1974).

The issue of unconscionability is one requiring factual development and determination. *Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991).

Unconscionability must be determined in light of general commercial background, commercial needs in the trade or the particular case, the relative bargaining position of the parties, and other circumstances existing when the contract was made. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).

Validity of Limitations.

A statement in fine print on a tag attached to the containing bag that warranty of tomato seed was limited to the price of seed and disclaiming liability for the crop was no defense to an action against a seed distributor from whom "Pink Shipper" tomato seed had been ordered by telephone and who shipped seed

of another unmarketable variety in a bag labelled in large letters on the tag, "Pink Shippers." *Dessert Seed Co. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970).

Disclaimer in paragraph dealing with "obligations" and "warranties" purporting to make the repair remedy exclusive was not sufficient as a limitation of remedies, since remedies are not "obligations," and if manufacturer had intended the repair remedy to be exclusive, it should have stated that intention in express language. *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W.2d 80 (1971).

Warranty which provided that it was "in lieu of all other warranties, express or implied ... and all other obligations or liabilities including liability for incidental and consequential damages" fell short of a limitation and exclusion. *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972).

An otherwise valid limitation of remedy contained in a contract is avoided by the buyer if the limitation fails of its essential purpose or is unconscionable. *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

Where the contractual language clearly limited the buyer's remedies to the purchase price, and plaintiffs presented no argument that the warranty failed of its essential purpose or is unconscionable, the remedy limitation applied. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), *aff'd sub nom. Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

4-2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

History. Acts 1961, No. 185, § 2-720; A.S.A. 1947, § 85-2-720.

CASE NOTES

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Herrick v.*

Robinson, 267 Ark. 576, 595 S.W.2d 637 (1980).

4-2-721. Remedies for fraud.

Remedies for material misrepresentation or fraud include all remedies available under this chapter for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

History. Acts 1961, No. 185, § 2-721; A.S.A. 1947, § 85-2-721.

CASE NOTES

ANALYSIS

In general.
Elements of deceit.
Punitive damages.
Rescission.
Revocation.

In General.

Nothing in this section says one may recover both a restitutionary award based on rescission and damages for fraud; it is no more than a repudiation of the preliminary election of remedies doctrine. The fact that "claims" based on revocation of acceptance of goods or rescission (disaffirmance of contract) and deceit (contract affirmance) are not to be regarded as inconsistent does not mean that "recoveries" on both theories are to be permitted. *Thomas Auto Co. v. Craft*, 297 Ark. 492, 763 S.W.2d 651 (1989).

Elements of Deceit.

Deceit consists of five elements which must be proven by a preponderance of the evidence: (1) a false representation of a material fact, (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation, (3) intent to induce action or inaction in reliance upon the representation, (4) justifiable reliance, and (5) damage suffered as a result of that reliance. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Punitive Damages.

One cannot recover punitive damages if the sole cause of action is based in contract; however, one should not be prevented from receiving punitive damages

in a contract action where the basis of revocation or rescission is conduct constituting the tort of deceit. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Punitive damages are available in a deceit action even if restitution rather than compensatory damages is awarded. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Rescission.

Although rescission of a contract is an equitable remedy, the right of restitution after rescission can be and has been asserted along with allegations of breach of warranty and the tort of deceit. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Revocation.

An award of restitution for valid revocation in addition to punitive damages is acceptable if the elements of the tort of deceit are proven. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Consumers rightfully revoked acceptance of an automobile purchase contract, and were properly awarded both compensatory and punitive damages, even though they had been driving the car almost two years, where the revocation occurred immediately after the consumers discovered that the car, sold as new, had previously been in a wreck and repainted. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980); *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984).

4-2-722. Who can sue third parties for injury to goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

History. Acts 1961, No. 185, § 2-722;
A.S.A. 1947, § 85-2-722.

4-2-723. Proof of market price — Time and place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (§ 4-2-708 or § 4-2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this chapter is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this chapter offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

History. Acts 1961, No. 185, § 2-723;
A.S.A. 1947, § 85-2-723.

CASE NOTES**Evidence.**

The trial court did not abuse its discretion in permitting the automobile dealer to testify to a national price for the limited issue automobile in order to establish the

market price of the automobile at the time of the defendant-seller's breach, where the limited number of the automobiles made it difficult to prove a market price in a given geographic location, and where

the buyer's national price was based on sales of those limited edition automobiles that he had made in at least nine states. *Chappell Chevrolet, Inc. v. Strickland*, 4

Ark. App. 108, 628 S.W.2d 25 (1982).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970).

4-2-724. Admissibility of market quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

History. Acts 1961, No. 185, § 2-724; A.S.A. 1947, § 85-2-724.

CASE NOTES

Applicability.

The provisions of this section concerning the admissibility of trade journals in evidence had no application to proof

where the issue involved usury and truth in lending. *Rowe Auto & Trailer Sales, Inc. v. King*, 257 Ark. 484, 517 S.W.2d 946 (1975).

4-2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one (1) year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before midnight, December 31, 1961.

History. Acts 1961, No. 185, § 2-725; A.S.A. 1947, § 85-2-725.

RESEARCH REFERENCES

ALR. Causes of action governed by limitations period in UCC § 2-725. 49 ALR 5th 1.

Ark. L. Rev. Unconscionable Contracts and the Uniform Commercial Code, 20 Ark. L. Rev. 165.

Legislative Note — Act 111 of 1973: An Act to Impose Liability for Injury and Damages Done in Certain Circumstances by Defective Products, 27 Ark. L. Rev. 562.

For Whom the Bell Tolls — An Interpretation

of the UCC's Exception as to Accrual of a Cause of Action for Future Performance Warranties, 28 Ark. L. Rev. 312.

The Personal Injury Action in Warranty — Has the Arkansas Strict Liability Statute Rendered It Obsolete? 28 Ark. L. Rev. 335.

Note, The Arkansas Product Liability Act of 1979, 35 Ark. L. Rev. 364.

CASE NOTES

ANALYSIS

Applicability.

Claim barred.

Extension of warranty.

Applicability.

The Arkansas savings statutes, this section and § 16-56-126, apply to actions originally filed in a foreign state where the original action was commenced within the statute of limitations specified for similar causes of action under Arkansas law. *LaBarge, Inc. v. Universal Circuits, Inc.*, 751 F. Supp. 807 (W.D. Ark. 1990).

The three-year statute of limitations found in § 16-116-103 of the Arkansas Product Liability Act of 1979, rather than the general four-year limitation in this section, governs a breach-of-warranty suit when damages for personal injury are sought; the Product Liability Act is both more specific and more recent than Arkansas's adoption of the Uniform Commercial Code. *Follette v. Wal-Mart Stores, Inc.*, 41

F.3d 1234 (8th Cir. 1994), supp. op. on reh'g, 47 F.3d 311 (8th Cir. 1995).

Claim Barred.

Warranty claim, based on goods delivered more than four years prior to the filing of plaintiff's action, was barred. *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993), aff'd sub nom. *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

Extension of Warranty.

Action for breach of warranty was barred by this section, where action was not brought until after the expiration of the statutory period, since an implied warranty could not be explicitly extended to future performance. *GMC v. Tate*, 257 Ark. 347, 516 S.W.2d 602 (1974).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Trace X Chem., Inc. v. Gulf Oil Chem. Co.*, 724 F.2d 68 (8th Cir. 1983); *Mobil Exploration & Producing N. Am., Inc. v. Graham Royalty Ltd.*, 910 F.2d 504 (8th Cir. 1990).

CHAPTER 2A

LEASES

PART.

1. GENERAL PROVISIONS.
2. FORMATION AND CONSTRUCTION OF LEASE CONTRACT.
3. EFFECT OF LEASE CONTRACT.
4. PERFORMANCE OF LEASE CONTRACT: REPUDIATED, SUBSTITUTED AND EXCUSED.
5. DEFAULT.

Publisher's Notes. Acts 1993, No. 439, § 5, provided that: "Transactions within

the scope of this act and validly entered into before the effective date of this act,

and the rights, duties, and interests flowing from them, remain valid thereafter and may be terminated, completed, consummated, or enforced as required or per-

mitted by any statute or other law amended or repealed by this act as though such repeal or amendment had not occurred."

RESEARCH REFERENCES

ALR. Computer sales and leases, time when cause of action for failure of performance accrues. 90 ALR 4th 298.

UALR L.J. Legislative Survey, Lease

Law, 16 UALR L.J. 153.

Am. Jur. N.T.S. Am. Jur. 2d, Leases of Pers. Prop., § 1 et seq.

PART 1 — GENERAL PROVISIONS

SECTION.

4-2A-101. Short title.

4-2A-102. Scope.

4-2A-103. Definitions and index of definitions.

4-2A-104. Leases subject to other law.

4-2A-105. Territorial application of chapter to goods covered by certificate of title.

4-2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

SECTION.

4-2A-107. Waiver or renunciation of claim or right after default.

4-2A-108. Unconscionability.

4-2A-109. Option to accelerate at will.

4-2A-110. Terminal rental adjustment clauses for vehicle leases — Not sales or security interests.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout

the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

4-2A-101. Short title.

This chapter shall be known and may be cited as the Uniform Commercial Code — Leases.

History. Acts 1993, No. 439, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

4-2A-102. Scope.

This chapter applies to any transaction, regardless of form, that creates a lease.

History. Acts 1993, No. 439, § 1.

4-2A-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. “Buying” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) “Cancellation” occurs when either party puts an end to the lease contract for default by the other party.

(c) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) “Conforming” goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) “Consumer lease” means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed twenty-five thousand dollars (\$25,000).

(f) “Fault” means wrongful act, omission, breach, or default.

(g) “Finance lease” means a lease with respect to which

- (i) the lessor does not select, manufacture, or supply the goods;
- (ii) the lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

(iii) one of the following occurs:

(A) the lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) the lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) the lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) if the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) "Goods" means all things that are movable at the time of identification to the lease contract, or are fixtures (§ 4-2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) "Installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each delivery is a separate lease" or its equivalent.

(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(l) "Lease contract" means the total legal obligation that results from the lease agreement as affected by this chapter and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.

(n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leased in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this chapter and the sections in which they appear are:

“Accessions”. Section 4-2A-310(1).

“Construction mortgage”. Section 4-2A-309(1)(d).

“Encumbrance”. Section 4-2A-309(1)(e).

“Fixtures”. Section 4-2A-309(1)(a).

“Fixture filing”. Section 4-2A-309(1)(b).

“Purchase money lease”. Section 4-2A-309(1)(c).

(3) The following definitions in other chapters apply to this chapter:

“Account”. Section 4-9-102(a)(2).

“Between merchants”. Section 4-2-104(3).

“Buyer”. Section 4-2-103(1)(a).

“Chattel paper”. Section 4-9-102(a)(11).

“Consumer goods”. Section 4-9-102(a)(23).

“Document”. Section 4-9-102(a)(30).

“Entrusting”. Section 4-2-403(3).

“General intangible”. Section 4-9-102(a)(42).

“Good faith”. Section 4-2-103(1)(b).

“Instrument”. Section 4-9-102(a)(47).

“Merchant”. Section 4-2-104(1).

“Mortgage”. Section 4-9-102(a)(55).

“Pursuant to commitment”. Section 4-9-102(a)(68).

“Receipt”. Section 4-2-103(1)(c).

“Sale”. Section 4-2-106(1).

“Sale on approval”. Section 4-2-326.

“Sale or return”. Section 4-2-326.

“Seller”. Section 4-2-103(1)(d).

(4) In addition, chapter 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History. Acts 1993, No. 439, § 1; 2001, No. 1439, § 9.

Amendments. The 2001 amendment rewrote (3).

4-2A-104. Leases subject to other law.

(1) A lease, although subject to this chapter, is also subject to any applicable:

(a) certificate of title statute of this state, including, but not limited to §§ 27-14-801 — 27-14-804 concerning the filing of liens and encumbrances on motor vehicles;

(b) certificate of title statute of another jurisdiction (§ 4-2A-105);

(c) consumer protection statute of this state, or final consumer protection decision of a court of this state existing on August 13, 1993.

(d) statute of this state creating conditions for the effectiveness and enforceability of the lease contract, including, but not limited to

§§ 6-62-601; 6-62-602; 6-62-603 [Repealed]; 6-62-604 [Repealed]; 6-62-605 — 6-62-613; 12-8-301 — 12-8-310; 14-16-108 — 14-16-110; 14-94-110; 14-138-111; 14-169-1003 and 14-169-1011; 14-184-119; 14-219-101; 14-362-126; 19-1-213; 22-2-114 and 22-2-115; 22-3-1101; 22-4-105; 22-4-501; 23-11-314; 23-112-404; 27-65-114; 28-51-203 and 28-51-303; and 28-72-204; or

(e) statute of this state dealing with a person's capacity or authority to enter into a lease contract.

(2) In case of conflict between this chapter, other than §§ 4-2A-105, 4-2A-304(3), and 4-2A-305(3), and a statute or decision referred to in subsection (1), the statute or decision controls.

(3) Failure to comply with an applicable law has only the effect specified therein.

History. Acts 1993, No. 439, § 1.

RESEARCH REFERENCES

UALR L.J. Note, Arkansas's New Motor Vehicle Quality Assurance Act — A Branch of Hope For Lemon Owners, 16 UALR L.J. 493.

4-2A-105. Territorial application of chapter to goods covered by certificate of title.

Subject to the provisions of §§ 4-2A-304(3) and 4-2A-305(3), with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a) surrender of the certificate, or (b) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

History. Acts 1993, No. 439, § 1.

4-2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within thirty (30) days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

History. Acts 1993, No. 439, § 1.

4-2A-107. Waiver or renunciation of claim or right after default.

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

History. Acts 1993, No. 439, § 1.

4-2A-108. Unconscionability.

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

History. Acts 1993, No. 439, § 1.

4-2A-109. Option to accelerate at will.

(1) A term providing that one party or his or her successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he or she deems himself or herself insecure" or in words of similar import must be construed to mean that he or she has power to do so only if he or she in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing lack of good faith under subsection (1) is on the party who exercised the

power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

History. Acts 1993, No. 439, § 1.

4-2A-110. Terminal rental adjustment clauses for vehicle leases — Not sales or security interests.

In the case of motor vehicles and trailers, notwithstanding any other provision of law, a leasing agreement involving a motor vehicle or trailer shall not create a sales transaction or a security interest in the vehicle merely because the lease contains provisions which provide that the rental price is permitted or required to be adjusted under the agreement either upward or downward based upon an amount which may be realized from a sale or other disposition of the vehicle after the end or termination of the lease period.

History. Acts 1997, No. 370, § 1.

PART 2 — FORMATION AND CONSTRUCTION OF LEASE CONTRACT

SECTION.

- 4-2A-201. Statute of frauds.
- 4-2A-202. Final written expression —
Parol or extrinsic evidence.
- 4-2A-203. Seals inoperative.
- 4-2A-204. Formation in general.
- 4-2A-205. Firm offers.
- 4-2A-206. Offer and acceptance in formation of lease contract.
- 4-2A-207. Course of performance or practical construction.
- 4-2A-208. Modification — Rescission — Waiver.
- 4-2A-209. Lessee under finance lease as beneficiary of supply contract.
- 4-2A-210. Express warranties.
- 4-2A-211. Warranties against interference and against infringement

SECTION.

- ment — Lessee's obligation against infringement.
- 4-2A-212. Implied warranty of merchantability.
- 4-2A-213. Implied warranty of fitness for particular purpose.
- 4-2A-214. Exclusion or modification of warranties.
- 4-2A-215. Cumulation and conflict of warranties express or implied.
- 4-2A-216. Third-party beneficiaries of express and implied warranties.
- 4-2A-217. Identification.
- 4-2A-218. Insurance and proceeds.
- 4-2A-219. Risk of loss.
- 4-2A-220. Effect of default on risk of loss.
- 4-2A-221. Casualty to identified goods.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

4-2A-201. Statute of frauds.

(1) A lease contract is not enforceable by way of action or defense unless:

(a) the total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than one thousand dollars (\$1,000); or

(b) there is a writing, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(2) Any description of leased goods or of the lease term is sufficient and satisfies subsection (1)(b), whether or not it is specific, if it reasonably identifies what is described.

(3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1)(b) beyond the lease term and the quantity of goods shown in the writing.

(4) A lease contract that does not satisfy the requirements of subsection (1), but which is valid in other respects, is enforceable:

(a) if the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(b) if the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods that have been received and accepted by the lessee.

(5) The lease term under a lease contract referred to in subsection (4) is:

(a) if there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

(b) if the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court a lease term, the term so admitted; or

(c) a reasonable lease term.

History. Acts 1993, No. 439, § 1.

4-2A-202. Final written expression — Parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade or by course of performance; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

History. Acts 1993, No. 439, § 1.

4-2A-203. Seals inoperative.

The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

History. Acts 1993, No. 439, § 1.

4-2A-204. Formation in general.

(1) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.

(2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(3) Although one (1) or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy.

History. Acts 1993, No. 439, § 1.

4-2A-205. Firm offers.

An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed three (3) months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

History. Acts 1993, No. 439, § 1.

4-2A-206. Offer and acceptance in formation of lease contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

History. Acts 1993, No. 439, § 1.

4-2A-207. Course of performance or practical construction.

(1) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.

(2) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.

(3) Subject to the provisions of § 4-2A-208 on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

History. Acts 1993, No. 439, § 1.

4-2A-208. Modification — Rescission — Waiver.

(1) An agreement modifying a lease contract needs no consideration to be binding.

(2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(3) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2), it may operate as a waiver.

(4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

History. Acts 1993, No. 439, § 1.

4-2A-209. Lessee under finance lease as beneficiary of supply contract.

(1) The benefit of a supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(2) The extension of the benefit of a supplier's promises and of warranties to the lessee (§ 4-2A-209(1)) does not: (i) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

History. Acts 1993, No. 439, § 1.

4-2A-210. Express warranties.

(1) Express warranties by the lessor are created as follows:

(a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

History. Acts 1993, No. 439, § 1.

4-2A-211. Warranties against interference and against infringement — Lessee's obligation against infringement.

(1) There is in a lease contract a warranty that for the lease term no

person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.

(2) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

History. Acts 1993, No. 439, § 1.

4-2A-212. Implied warranty of merchantability.

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the description in the lease agreement;

(b) in the case of fungible goods, are of fair average quality within the description;

(c) are fit for the ordinary purposes for which goods of that type are used;

(d) run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;

(e) are adequately contained, packaged, and labeled as the lease agreement may require; and

(f) conform to any promises or affirmations of fact made on the container or label.

(3) Other implied warranties may arise from course of dealing or usage of trade.

History. Acts 1993, No. 439, § 1.

4-2A-213. Implied warranty of fitness for particular purpose.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

History. Acts 1993, No. 439, § 1.

4-2A-214. Exclusion or modification of warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of § 4-2A-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability", be by a writing, and be conspicuous. Subject to subsection (3), to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, "There is no warranty that the goods will be fit for a particular purpose".

(3) Notwithstanding subsection (2), but subject to subsection (4),

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;

(b) if the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and

(c) an implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade.

(4) To exclude or modify a warranty against interference or against infringement (§ 4-2A-211) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person.

History. Acts 1993, No. 439, § 1.

4-2A-215. Cumulation and conflict of warranties express or implied.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

History. Acts 1993, No. 439, § 1.

4-2A-216. Third-party beneficiaries of express and implied warranties.

A warranty to or for the benefit of a lessee under this chapter, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

History. Acts 1993, No. 439, § 1.

4-2A-217. Identification.

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(a) when the lease contract is made if the lease contract is for a lease of goods that are existing and identified;

(b) when the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

(c) when the young are conceived, if the lease contract is for a lease of unborn young of animals.

History. Acts 1993, No. 439, § 1.

4-2A-218. Insurance and proceeds.

(1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

(3) If a lessee has an insurable interest under subsections (1) and (2), the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(5) The parties by agreement may determine that one (1) or more parties have an obligation to obtain and pay for insurance covering the

goods and by agreement may determine the beneficiary of the proceeds of the insurance.

History. Acts 1993, No. 439, § 1.

4-2A-219. Risk of loss.

(1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(2) Subject to the provisions of this chapter on the effect of default on risk of loss (§ 4-2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(a) If the lease contract requires or authorizes the goods to be shipped by carrier

(i) and it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(ii) if it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.

(c) In any case not within subsection (a) or (b), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

History. Acts 1993, No. 439, § 1.

4-2A-220. Effect of default on risk of loss.

(1) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(a) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(b) If the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his or her effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

History. Acts 1993, No. 439, § 1.

4-2A-221. Casualty to identified goods.

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or § 4-2A-219, then:

- (a) if the loss is total, the lease contract is avoided; and
- (b) if the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his or her option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

History. Acts 1993, No. 439, § 1.

PART 3 — EFFECT OF LEASE CONTRACT

SECTION.

- 4-2A-301. Enforceability of lease contract.
- 4-2A-302. Title to and possession of goods.
- 4-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods — Delegation of performance — Transfer of rights.
- 4-2A-304. Subsequent lease of goods by lessor.
- 4-2A-305. Sale or sublease of goods by lessee.
- 4-2A-306. Priority of certain liens arising by operation of law.

SECTION.

- 4-2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.
- 4-2A-308. Special rights of creditors.
- 4-2A-309. Lessor's and lessee's rights when goods become fixtures.
- 4-2A-310. Lessor's and lessee's rights when goods become accessions.
- 4-2A-311. Priority subject to subordination.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce du-

plicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For

example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9

become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

4-2A-301. Enforceability of lease contract.

Except as otherwise provided in this chapter, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

History. Acts 1993, No. 439, § 1.

4-2A-302. Title to and possession of goods.

Except as otherwise provided in this chapter, each provision of this chapter applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

History. Acts 1993, No. 439, § 1.

4-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods — Delegation of performance — Transfer of rights.

(1) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to chapter 9, secured transactions, by reason of § 4-9-109(a)(3).

(2) Except as provided in subsection (3) and § 4-9-407, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4).

(4) Subject to subsection (3) and § 4-9-407:

(a) if a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in § 4-2A-501(2);

(b) if paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(5) A transfer of “the lease” or of “all my rights under the lease”, or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.

History. Acts 1993, No. 439, § 1; 2001, No. 1439, § 10.

Amendments. The 2001 amendment rewrote the section.

4-2A-304. Subsequent lease of goods by lessor.

(1) Subject to § 4-2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (2) and § 4-2A-527(4), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

(a) the lessor’s transferor was deceived as to the identity of the lessor;

(b) the delivery was in exchange for a check which is later dishonored;

(c) it was agreed that the transaction was to be a “cash sale”; or
(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods, and takes free of the existing lease contract.

(3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

History. Acts 1993, No. 439, § 1.

4-2A-305. Sale or sublease of goods by lessee.

(1) Subject to the provisions of § 4-2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and § 4-2A-511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

(a) the lessor was deceived as to the identity of the lessee;
(b) the delivery was in exchange for a check which is later dishonored; or

(c) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(3) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

History. Acts 1993, No. 439, § 1.

4-2A-306. Priority of certain liens arising by operation of law.

If a person in the ordinary course of his or her business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this chapter unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

History. Acts 1993, No. 439, § 1.

4-2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

(1) Except as otherwise provided in § 4-2A-306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsection (3) and in §§ 4-2A-306 and 4-2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in §§ 4-9-317, 4-9-321, and 4-9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.

History. Acts 1993, No. 439, § 1; 2001, No. 1439, § 11.

Amendments. The 2001 amendment rewrote the section.

4-2A-308. Special rights of creditors.

(1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(2) Nothing in this chapter impairs the rights of creditors of a lessor if the lease contract (a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security, or the like, and (b) is made under circumstances which under any statute or rule of law apart from this chapter would constitute the transaction a fraudulent transfer or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

History. Acts 1993, No. 439, § 1.

4-2A-309. Lessor's and lessee's rights when goods become fixtures.

(1) In this section:

(a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;

(b) a "fixture filing" is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of § 4-9-502(a) and (b);

(c) a lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

(d) a mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and

(e) "encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this chapter a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this chapter of ordinary building materials incorporated into an improvement on land.

(3) This chapter does not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(a) the lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten (10) days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(b) the interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

(a) the fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

(b) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) the encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) the lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding subsection (4)(a) but otherwise subject to subsections (4) and (5), the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this chapter, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this chapter, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures, including the lessor's residual interest, in accordance with the relevant provisions of the chapter on secured transactions, chapter 9 of this title.

History. Acts 1993, No. 439, § 1; 2001, No. 1439, § 12.

in (1)(b), inserted "record of" and substituted "§ 4-9-502(a) and (b)" for "§ 4-9-402(5)."

Amendments. The 2001 amendment,

CASE NOTES

Fixtures.

Arkansas courts have adopted a three-part test to determine whether an item is a fixture: (1) whether the item is annexed to the realty; (2) whether the item is appropriate and adapted to the use or purpose of that part of the realty to which the item is connected; and (3) whether the

party making annexation intended to make it permanent. *Rice v. Fas Fax Corp.* (In re Hot Shots Burgers & Fries, Inc.), 169 Bankr. 920 (Bankr. E.D. Ark. 1994).

Modular building held not to be a permanent fixture. *Rice v. Fas Fax Corp.* (In re Hot Shots Burgers & Fries, Inc.), 169 Bankr. 920 (Bankr. E.D. Ark. 1994).

4-2A-310. Lessor's and lessee's rights when goods become accessions.

(1) Goods are "accessions" when they are installed in or affixed to other goods.

(2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (4).

(3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (4) but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) is subordinate to the interest of

(a) a buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or

(b) a creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this chapter, or (b) if necessary to enforce his or her other rights and remedies under this chapter, remove the goods from the whole, free and clear of all interests in the whole, but he or she must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

4-2A-311. Priority subject to subordination.

Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

History. Acts 1993, No. 439, § 1.

PART 4 — PERFORMANCE OF LEASE CONTRACT: REPUDIATED, SUBSTITUTED AND EXCUSED**SECTION.**

4-2A-401. Insecurity — Adequate assurance of performance.

4-2A-402. Anticipatory repudiation.

4-2A-403. Retraction of anticipatory repudiation.

4-2A-404. Substituted performance.

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4-2A-405. Excused performance.

4-2A-406. Procedure on excused performance.

4-2A-407. Irrevocable promises — Finance leases.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

4-2A-401. Insecurity — Adequate assurance of performance.

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he or she has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed thirty (30) days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

History. Acts 1993, No. 439, § 1.

4-2A-402. Anticipatory repudiation.

If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which perfor-

mance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(a) for a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;

(b) make demand pursuant to § 4-2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or

(c) resort to any right or remedy upon default under the lease contract or this chapter, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one (1) of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this chapter on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (§ 4-2A-524).

History. Acts 1993, No. 439, § 1.

4-2A-403. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has cancelled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under § 4-2A-401.

(3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

History. Acts 1993, No. 439, § 1.

4-2A-404. Substituted performance.

(1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(a) the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and

(b) if delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory.

History. Acts 1993, No. 439, § 1.

4-2A-405. Excused performance.

Subject to § 4-2A-404 on substituted performance, the following rules apply:

(a) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(b) If the causes mentioned in paragraph (a) affect only part of the lessor's or the supplier's capacity to perform, he or she shall allocate production and deliveries among his or her customers but at his or her option may include regular customers not then under contract for sale or lease as well as his or her own requirements for further manufacture. He or she may so allocate in any manner that is fair and reasonable.

(c) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under paragraph (b), of the estimated quota thus made available for the lessee.

History. Acts 1993, No. 439, § 1.

4-2A-406. Procedure on excused performance.

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under § 4-2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§ 4-2A-510):

(a) terminate the lease contract (§ 4-2A-505(2)); or

(b) except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under § 4-2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty (30) days, the lease contract lapses with respect to any deliveries affected.

History. Acts 1993, No. 439, § 1.

4-2A-407. Irrevocable promises — Finance leases.

(1) In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

(2) A promise that has become irrevocable and independent under subsection (1):

(a) is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

(b) is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

(3) This section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

History. Acts 1993, No. 439, § 1.

PART 5 — DEFAULT**SECTION.****A. In General**

4-2A-501. Default — Procedure.

4-2A-502. Notice after default.

4-2A-503. Modification or impairment of rights and remedies.

4-2A-504. Liquidation of damages.

4-2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

4-2A-506. Statute of limitations.

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B. Default by Lessor

4-2A-508. Lessee's remedies.

4-2A-509. Lessee's rights on improper delivery — Rightful rejection.

4-2A-510. Installment lease contracts — Rejection and default.

4-2A-511. Merchant lessee's duties as to rightfully rejected goods.

4-2A-512. Lessee's duties as to rightfully rejected goods.

4-2A-513. Cure by lessor of improper tender or delivery — Replacement.

4-2A-514. Waiver of lessee's objections.

4-2A-515. Acceptance of goods.

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den of establishing default after acceptance — Notice of claim or litigation to person answerable over.

4-2A-517. Revocation of acceptance of goods.

4-2A-518. Cover — Substitute goods.

4-2A-519. Lessee's damages for non-delivery, repudiation, default, and breach of warranty in regard to accepted goods.

4-2A-520. Lessee's incidental and consequential damages.

4-2A-521. Lessee's right to specific performance or replevin.

4-2A-522. Lessee's right to goods on lessor's insolvency.

C. Default by Lessee

4-2A-523. Lessor's remedies.

4-2A-524. Lessor's right to identify goods to lease contract.

4-2A-525. Lessor's right to possession of goods.

4-2A-526. Lessor's stoppage of delivery in transit or otherwise.

4-2A-527. Lessor's rights to dispose of goods.

4-2A-528. Lessor's damages for non-acceptance, failure to pay, repudiation, or other default.

4-2A-529. Lessor's action for the rent.

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4-2A-530. Lessor's incidental damages.
 4-2A-531. Standing to sue third parties
 for injury to goods.

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4-2A-532. Lessor's rights to residual interest.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. Computer sales and leases, time when cause of action for failure of performance accrues. 90 ALR 4th 298.

A. In General

4-2A-501. Default — Procedure.

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this chapter.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this chapter, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this chapter.

(4) Except as otherwise provided in § 4-1-106(1) or this chapter or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this part does not apply.

History. Acts 1993, No. 439, § 1.

4-2A-502. Notice after default.

Except as otherwise provided in this chapter or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

History. Acts 1993, No. 439, § 1.

4-2A-503. Modification or impairment of rights and remedies.

(1) Except as otherwise provided in this chapter, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter.

(2) Resort to a remedy provided under this chapter or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this chapter.

(3) Consequential damages may be liquidated under § 4-2A-504, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation, alteration, or exclusion of damages where the loss is commercial is not *prima facie* unconscionable.

(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this chapter.

History. Acts 1993, No. 439, § 1.

4-2A-504. Liquidation of damages.

(1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this chapter.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (§ 4-2A-525 or § 4-2A-526), the lessee is entitled to restitution of any amount by which the sum of his or her payments exceeds:

(a) the amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (1); or

(b) in the absence of those terms, 20 percent (20%) of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or five hundred dollars (\$500).

(4) A lessee's right to restitution under subsection (3) is subject to offset to the extent the lessor establishes:

- (a) a right to recover damages under the provisions of this chapter other than subsection (1); and
- (b) the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

History. Acts 1993, No. 439, § 1.

4-2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

(1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(3) Unless the contrary intention clearly appears, expressions of "cancellation," "rescission," or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this chapter for default.

(5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

History. Acts 1993, No. 439, § 1.

4-2A-506. Statute of limitations.

(1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four (4) years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one year.

(2) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

(3) If an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this chapter becomes effective.

History. Acts 1993, No. 439, § 1.

RESEARCH REFERENCES

ALR. Computer sales and leases, time when cause of action for failure of performance accrues. 90 ALR 4th 298.

4-2A-507. Proof of market rent — Time and place.

(1) Damages based on market rent (§ 4-2A-519 or § 4-2A-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in §§ 4-2A-519 and 4-2A-528.

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this chapter is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this chapter offered by one party is not admissible unless and until he or she has given the other party notice the court finds sufficient to prevent unfair surprise.

(4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

History. Acts 1993, No. 439, § 1.

B. Default by Lessor

4-2A-508. Lessee's remedies.

(1) If a lessor fails to deliver the goods in conformity to the lease contract (§ 4-2A-509) or repudiates the lease contract (§ 4-2A-402), or a lessee rightfully rejects the goods (§ 4-2A-509) or justifiably revokes acceptance of the goods (§ 4-2A-517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially

impaired (§ 4-2A-510), the lessor is in default under the lease contract and the lessee may:

- (a) cancel the lease contract (§ 4-2A-505(1));
- (b) recover so much of the rent and security as has been paid and is just under the circumstances;
- (c) cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (§§ 4-2A-518 and 4-2A-520), or recover damages for nondelivery (§§ 4-2A-519 and 4-2A-520);
- (d) exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

- (a) if the goods have been identified, recover them (§ 4-2A-522); or
- (b) in a proper case, obtain specific performance or replevy the goods (§ 4-2A-521).

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in § 4-2A-519(3).

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (§ 4-2A-519(4)).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to § 4-2A-527(5).

(6) Subject to the provisions of § 4-2A-407, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

History. Acts 1993, No. 439, § 1.

4-2A-509. Lessee's rights on improper delivery — Rightful rejection.

(1) Subject to the provisions of § 4-2A-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

History. Acts 1993, No. 439, § 1.

4-2A-510. Installment lease contracts — Rejection and default.

(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

History. Acts 1993, No. 439, § 1.

4-2A-511. Merchant lessee's duties as to rightfully rejected goods.

(1) Subject to any security interest of a lessee (§ 4-2A-508(5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his or her possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (subsection (1)) or any other lessee (§ 4-2A-512) disposes of goods, he or she is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding 10 percent (10%) of the gross proceeds.

(3) In complying with this section or § 4-2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to this section or § 4-2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one (1) or more of the requirements of this chapter.

History. Acts 1993, No. 439, § 1.

4-2A-512. Lessee's duties as to rightfully rejected goods.

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (§ 4-2A-511) and subject to any security interest of a lessee (§ 4-2A-508(5)):

(a) the lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(b) if the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in § 4-2A-511; but

(c) the lessee has no further obligations with regard to goods rightfully rejected.

(2) Action by the lessee pursuant to subsection (1) is not acceptance or conversion.

History. Acts 1993, No. 439, § 1.

4-2A-513. Cure by lessor of improper tender or delivery — Replacement.

(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.

(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he or she seasonably notifies the lessee.

History. Acts 1993, No. 439, § 1.

4-2A-514. Waiver of lessee's objections.

(1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

(a) if, stated seasonably, the lessor or the supplier could have cured it (§ 4-2A-513); or

(b) between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents.

History. Acts 1993, No. 439, § 1.

4-2A-515. Acceptance of goods.

(1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and

(a) the lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

(b) the lessee fails to make an effective rejection of the goods (§ 4-2A-509(2)).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

History. Acts 1993, No. 439, § 1.

4-2A-516. Effect of acceptance of goods — Notice of default — Burden of establishing default after acceptance — Notice of claim or litigation to person answerable over.

(1) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.

(2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this chapter or the lease agreement for nonconformity.

(3) If a tender has been accepted:

(a) within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;

(b) except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (§ 4-2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(c) the burden is on the lessee to establish any default.

(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two (2) litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (§ 4-2A-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

(5) Subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (§ 4-2A-211).

History. Acts 1993, No. 439, § 1.

4-2A-517. Revocation of acceptance of goods.

(1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:

(a) except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(2) Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

History. Acts 1993, No. 439, § 1.

4-2A-518. Cover — Substitute goods.

(1) After a default by a lessor under the lease contract of the type described in § 4-2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 4-2A-504) or otherwise determined pursuant to agreement of the parties (§§ 4-1-102(3) and 4-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and § 4-2A-519 governs.

History. Acts 1993, No. 439, § 1.

4-2A-519. Lessee's damages for non-delivery, repudiation, default, and breach of warranty in regard to accepted goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 4-2A-504) or otherwise determined pursuant to agreement of the parties (§§ 4-1-102(3) and 4-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under § 4-2A-518(2), or is by purchase or otherwise, the measure of damages for non-delivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (§ 4-2A-516(3)), the measure of damages for non-conforming tender or delivery or other default by a lessor is the loss

resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

History. Acts 1993, No. 439, § 1.

4-2A-520. Lessee's incidental and consequential damages.

(1) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(2) Consequential damages resulting from a lessor's default include:

- (a) any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

History. Acts 1993, No. 439, § 1.

4-2A-521. Lessee's right to specific performance or replevin.

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

History. Acts 1993, No. 439, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Specific Performance in Arkansas, 1995 Ark. L. Notes 17.

4-2A-522. Lessee's right to goods on lessor's insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (§ 4-2A-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within ten (10) days after receipt of the first installment of rent and security.

(2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

History. Acts 1993, No. 439, § 1.

C. Default by Lessee**4-2A-523. Lessor's remedies.**

(1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§ 4-2A-510), the lessee is in default under the lease contract and the lessor may:

(a) cancel the lease contract (§ 4-2A-505(1));

(b) proceed respecting goods not identified to the lease contract (§ 4-2A-524);

(c) withhold delivery of the goods and take possession of goods previously delivered (§ 4-2A-525);

(d) stop delivery of the goods by any bailee (§ 4-2A-526);

(e) dispose of the goods and recover damages (§ 4-2A-527), or retain the goods and recover damages (§ 4-2A-528), or in a proper case recover rent (§ 4-2A-529);

(f) exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (1), the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.

(3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

(a) if the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsections (1) or (2); or

(b) if the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2).

History. Acts 1993, No. 439, § 1.

4-2A-524. Lessor's right to identify goods to lease contract.

(1) After default by the lessee under the lease contract of the type described in § 4-2A-523(1) or § 4-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor may:

(a) identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(b) dispose of goods (§ 4-2A-527(1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

History. Acts 1993, No. 439, § 1.

4-2A-525. Lessor's right to possession of goods.

(1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(2) After a default by the lessee under the lease contract of the type described in § 4-2A-523(1) or § 4-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (§ 4-2A-527).

(3) The lessor may proceed under subsection (2) without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

History. Acts 1993, No. 439, § 1.

4-2A-526. Lessor's stoppage of delivery in transit or otherwise.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment

due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until

(a) receipt of the goods by the lessee;

(b) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or

(c) such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.

(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

History. Acts 1993, No. 439, § 1.

4-2A-527. Lessor's rights to dispose of goods.

(1) After a default by a lessee under the lease contract of the type described in § 4-2A-523(1) or § 4-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (§ 4-2A-525 or § 4-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 4-2A-504) or otherwise determined pursuant to agreement of the parties (§§ 4-1-102(3) and 4-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under § 4-2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and § 4-2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one (1) or more of the requirements of this chapter.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (§ 4-2A-508(5)).

History. Acts 1993, No. 439, § 1.

4-2A-528. Lessor's damages for non-acceptance, failure to pay, repudiation, or other default.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 4-2A-504) or otherwise determined pursuant to agreement of the parties (§§ 4-1-102(3) and 4-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under § 4-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in § 4-2A-523(1) or § 4-2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place computed for the same lease term, and (iii) any incidental damages allowed under § 4-2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under § 4-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

History. Acts 1993, No. 439, § 1.

4-2A-529. Lessor's action for the rent.

(1) After default by the lessee under the lease contract of the type described in § 4-2A-523(1) or § 4-2A-523(3)(a) or, if agreed, after other default by the lessee, if the lessor complies with subsection (2), the lessor may recover from the lessee as damages:

(a) for goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (§ 4-2A-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under § 4-2A-530, less expenses saved in consequence of the lessee's default; and

(b) for goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under § 4-2A-530, less expenses saved in consequence of the lessee's default.

(2) Except as provided in subsection (3), the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by § 4-2A-527 or § 4-2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to § 4-2A-527 or § 4-2A-528.

(4) Payment of the judgment for damages obtained pursuant to subsection (1) entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.

(5) After default by the lessee under the lease contract of the type described in § 4-2A-523(1) or § 4-2A-523(3)(a) or, if agreed, after other default by the lessee, a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for non-acceptance under § 4-2A-527 or § 4-2A-528.

History. Acts 1993, No. 439, § 1.

4-2A-530. Lessor's incidental damages.

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

History. Acts 1993, No. 439, § 1.

4-2A-531. Standing to sue third parties for injury to goods.

(1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (a) the lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

- (i) has a security interest in the goods;
- (ii) has an insurable interest in the goods; or
- (iii) bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his or her suit or settlement, subject to his or her own interest, is as a fiduciary for the other party to the lease contract.

(3) Either party with the consent of the other may sue for the benefit of whom it may concern.

History. Acts 1993, No. 439, § 1.

4-2A-532. Lessor's rights to residual interest.

In addition to any other recovery permitted by this chapter or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

History. Acts 1993, No. 439, § 1.

CHAPTER 3**NEGOTIABLE INSTRUMENTS****PART.**

1. GENERAL PROVISIONS AND DEFINITIONS.
2. NEGOTIATION, TRANSFER, AND INDORSEMENT.
3. ENFORCEMENT OF INSTRUMENTS.
4. LIABILITY OF PARTIES.
5. DISHONOR.
6. DISCHARGE AND PAYMENT.

A.C.R.C. Notes. Former chapter 3, concerning commercial paper was repealed by Acts 1991, No. 572, § 9. Research references noted in chapter 3 discuss that prior law but may be of some assistance in construing similar provisions in the present chapter 3.

Publisher's Notes. Former chapter 3,

concerning commercial paper was repealed by Acts 1991, No. 572, § 9. The former chapter was derived from the following sources:

§ 4-3-101. Acts 1961, No. 185, § 3-101; A.S.A. 1947, § 85-3-101.

§ 4-3-102. Acts 1961, No. 185, § 3-102; A.S.A. 1947, § 85-3-102.

- § 4-3-103. Acts 1961, No. 185, § 3-103;
A.S.A. 1947, § 85-3-103.
- § 4-3-104. Acts 1961, No. 185, § 3-104;
A.S.A. 1947, § 85-3-104.
- § 4-3-105. Acts 1961, No. 185, § 3-105;
1967, No. 303, § 5; A.S.A. 1947, § 85-3-105.
- § 4-3-106. Acts 1961, No. 185, § 3-106;
A.S.A. 1947, § 85-3-106.
- § 4-3-107. Acts 1961, No. 185, § 3-107;
A.S.A. 1947, § 85-3-107.
- § 4-3-108. Acts 1961, No. 185, § 3-108;
A.S.A. 1947, § 85-3-108.
- § 4-3-109. Acts 1961, No. 185, § 3-109;
A.S.A. 1947, § 85-3-109.
- § 4-3-110. Acts 1961, No. 185, § 3-110;
A.S.A. 1947, § 85-3-110.
- § 4-3-111. Acts 1961, No. 185, § 3-111;
A.S.A. 1947, § 85-3-111.
- § 4-3-112. Acts 1961, No. 185, § 3-112;
1967, No. 303, § 6; A.S.A. 1947, § 85-3-112.
- § 4-3-113. Acts 1961, No. 185, § 3-113;
A.S.A. 1947, § 85-3-113.
- § 4-3-114. Acts 1961, No. 185, § 3-114;
A.S.A. 1947, § 85-3-114.
- § 4-3-115. Acts 1961, No. 185, § 3-115;
A.S.A. 1947, § 85-3-115.
- § 4-3-116. Acts 1961, No. 185, § 3-116;
A.S.A. 1947, § 85-3-116.
- § 4-3-117. Acts 1961, No. 185, § 3-117;
A.S.A. 1947, § 85-3-117.
- § 4-3-118. Acts 1961, No. 185, § 3-118;
A.S.A. 1947, § 85-3-118.
- § 4-3-119. Acts 1961, No. 185, § 3-119;
A.S.A. 1947, § 85-3-119.
- § 4-3-120. Acts 1961, No. 185, § 3-120;
A.S.A. 1947, § 85-3-120.
- § 4-3-121. Acts 1961, No. 185, § 3-121;
A.S.A. 1947, § 85-3-121.
- § 4-3-122. Acts 1961, No. 185, § 3-122;
A.S.A. 1947, § 85-3-122.
- § 4-3-201. Acts 1961, No. 185, § 3-201;
A.S.A. 1947, § 85-3-201.
- § 4-3-202. Acts 1961, No. 185, § 3-202;
A.S.A. 1947, § 85-3-202.
- § 4-3-203. Acts 1961, No. 185, § 3-203;
A.S.A. 1947, § 85-3-203.
- § 4-3-204. Acts 1961, No. 185, § 3-204;
A.S.A. 1947, § 85-3-204.
- § 4-3-205. Acts 1961, No. 185, § 3-205;
A.S.A. 1947, § 85-3-205.
- § 4-3-206. Acts 1961, No. 185, § 3-206;
A.S.A. 1947, § 85-3-206.
- § 4-3-207. Acts 1961, No. 185, § 3-207;
A.S.A. 1947, § 85-3-207.
- § 4-3-208. Acts 1961, No. 185, § 3-208;
A.S.A. 1947, § 85-3-208.
- § 4-3-301. Acts 1961, No. 185, § 3-301;
A.S.A. 1947, § 85-3-301.
- § 4-3-302. Acts 1961, No. 185, § 3-302;
A.S.A. 1947, § 85-3-302.
- § 4-3-303. Acts 1961, No. 185, § 3-303;
A.S.A. 1947, § 85-3-303.
- § 4-3-304. Acts 1961, No. 185, § 3-304;
A.S.A. 1947, § 85-3-304.
- § 4-3-305. Acts 1961, No. 185, § 3-305;
A.S.A. 1947, § 85-3-305.
- § 4-3-306. Acts 1961, No. 185, § 3-306;
A.S.A. 1947, § 85-3-306.
- § 4-3-307. Acts 1961, No. 185, § 3-307;
A.S.A. 1947, § 85-3-307.
- § 4-3-401. Acts 1961, No. 185, § 3-401;
A.S.A. 1947, § 85-3-401.
- § 4-3-402. Acts 1961, No. 185, § 3-402;
A.S.A. 1947, § 85-3-402.
- § 4-3-403. Acts 1961, No. 185, § 3-403;
A.S.A. 1947, § 85-3-403.
- § 4-3-404. Acts 1961, No. 185, § 3-404;
A.S.A. 1947, § 85-3-404.
- § 4-3-405. Acts 1961, No. 185, § 3-405;
A.S.A. 1947, § 85-3-405.
- § 4-3-406. Acts 1961, No. 185, § 3-406;
A.S.A. 1947, § 85-3-406.
- § 4-3-407. Acts 1961, No. 185, § 3-407;
A.S.A. 1947, § 85-3-407.
- § 4-3-408. Acts 1961, No. 185, § 3-408;
A.S.A. 1947, § 85-3-408.
- § 4-3-409. Acts 1961, No. 185, § 3-409;
A.S.A. 1947, § 85-3-409.
- § 4-3-410. Acts 1961, No. 185, § 3-410;
A.S.A. 1947, § 85-3-410.
- § 4-3-411. Acts 1961, No. 185, § 3-411;
A.S.A. 1947, § 85-3-411.
- § 4-3-412. Acts 1961, No. 185, § 3-412;
A.S.A. 1947, § 85-3-412.
- § 4-3-413. Acts 1961, No. 185, § 3-413;
A.S.A. 1947, § 85-3-413.
- § 4-3-414. Acts 1961, No. 185, § 3-414;
A.S.A. 1947, § 85-3-414.
- § 4-3-415. Acts 1961, No. 185, § 3-415;
A.S.A. 1947, § 85-3-415.
- § 4-3-416. Acts 1961, No. 185, § 3-416;
A.S.A. 1947, § 85-3-416.
- § 4-3-417. Acts 1961, No. 185, § 3-417;
A.S.A. 1947, § 85-3-417.
- § 4-3-418. Acts 1961, No. 185, § 3-418;
A.S.A. 1947, § 85-3-418.
- § 4-3-419. Acts 1961, No. 185, § 3-419;
A.S.A. 1947, § 85-3-419.
- § 4-3-501. Acts 1961, No. 185, § 3-501;
1967, No. 303, § 10; A.S.A. 1947, § 85-3-501.
- § 4-3-502. Acts 1961, No. 185, § 3-502;
A.S.A. 1947, § 85-3-502.

§ 4-3-503. Acts 1961, No. 185, § 3-503; A.S.A. 1947, § 85-3-503.

§ 4-3-504. Acts 1961, No. 185, § 3-504; 1967, No. 303, § 11; A.S.A. 1947, § 85-3-504.

§ 4-3-505. Acts 1961, No. 185, § 3-505; A.S.A. 1947, § 85-3-505.

§ 4-3-506. Acts 1961, No. 185, § 3-506; A.S.A. 1947, § 85-3-506.

§ 4-3-507. Acts 1961, No. 185, § 3-507; A.S.A. 1947, § 85-3-507.

§ 4-3-508. Acts 1961, No. 185, § 3-508; A.S.A. 1947, § 85-3-508.

§ 4-3-509. Acts 1961, No. 185, § 3-509; A.S.A. 1947, § 85-3-509.

§ 4-3-510. Acts 1961, No. 185, § 3-510; A.S.A. 1947, § 85-3-510.

§ 4-3-511. Acts 1961, No. 185, § 3-511; A.S.A. 1947, § 85-3-511.

§ 4-3-601. Acts 1961, No. 185, § 3-601; A.S.A. 1947, § 85-3-601.

§ 4-3-602. Acts 1961, No. 185, § 3-602; A.S.A. 1947, § 85-3-602.

§ 4-3-603. Acts 1961, No. 185, § 3-603; A.S.A. 1947, § 85-3-603.

§ 4-3-604. Acts 1961, No. 185, § 3-604; A.S.A. 1947, § 85-3-604.

§ 4-3-605. Acts 1961, No. 185, § 3-605; A.S.A. 1947, § 85-3-605.

§ 4-3-606. Acts 1961, No. 185, § 3-606; A.S.A. 1947, § 85-3-606.

§ 4-3-701. Acts 1961, No. 185, § 3-701; A.S.A. 1947, § 85-3-701.

§ 4-3-801. Acts 1961, No. 185, § 3-801; A.S.A. 1947, § 85-3-801.

§ 4-3-802. Acts 1961, No. 185, § 3-802; A.S.A. 1947, § 85-3-802.

§ 4-3-803. Acts 1961, No. 185, § 3-803; A.S.A. 1947, § 85-3-803.

§ 4-3-804. Acts 1961, No. 185, § 3-804; A.S.A. 1947, § 85-3-804.

§ 4-3-805. Acts 1961, No. 185, § 3-805; A.S.A. 1947, § 85-3-805.

RESEARCH REFERENCES

ALR. Unintentional cancellation of negotiable instrument under UCC Article 3. 59 ALR 4th 617.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 ALR 4th 778.

Negotiability of instrument providing for variable rate of interest under UCC § 3-106. 69 ALR 4th 1127.

What constitutes "dealing" under UCC § 3-305(2), providing that holder in due course takes instrument free from all defenses of any party to instrument with whom holder has not dealt. 42 ALR 5th 137.

Construction and effect of "Padded payroll" rule of UCC § 3-405. 45 ALR 5th 389.

Am. Jur. 11 Am. Jur. 2d, Bills & Notes, § 41 et seq.

Ark. L. Notes. Copeland, A Statutory Primer: Revised Article 3 of the U.C.C.—Negotiable Instruments, 1992 Ark. L. Notes 65.

Ark. L. Rev. Commercial Paper: Article III, 16 Ark. L. Rev. 33.

The Uniform Commercial Code and the Arkansas Electronic Funds Transfer System, Hargis, 32 Ark. L. Rev. 470.

Murphey, Revised Article 3 and Amended Article 4 of the Uniform Commercial Code: Comments on the Changes They Will Make, 46 Ark. L. Rev. 501.

UALR L.J. Murphey, Acceptance and Dishonor: "Payable Through" Drafts and Personal Money Orders, 5 UALR L.J. 519.

Verdun, Postdated checks: An old problem with a new solution in the revised U.C.C., 14 UALR L.J. 37.

Adams, Problems with the 1990 Revision of Articles 3 and 4 of the Uniform Commercial Code, 15 UALR L.J. 665.

Jenkins, Arkansas's Revised Article 3: User Caution Advised!!, 16 UALR L.J. 573.

PART 1 — GENERAL PROVISIONS AND DEFINITIONS

SECTION.

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SECTION.

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SECTION.

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- 4-3-115. Incomplete instrument.
- 4-3-116. Joint and several liability — Contribution.
- 4-3-117. Other agreements affecting instrument.
- 4-3-118. Statute of limitations.
- 4-3-119. Notice of right to defend action.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. Negotiability: Provision in draft or note directing payment "on acceptance" as affecting. 19 ALR 4th 1268.
 Negotiability of instrument providing

for variable rate of interest under UCC § 3-106. 69 ALR 4th 1127.

UALR L.J. Survey—Business Law, 14 UALR L.J. 735.

4-3-101. Short title.

This chapter may be cited as Uniform Commercial Code — Negotiable Instruments.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

4-3-102. Subject matter.

(a) This chapter applies to negotiable instruments. It does not apply to money, to payment orders governed by § 4-4A-101 et seq., or to securities governed by § 4-8-101 et seq.

(b) If there is conflict between this chapter and chapter 4 or chapter 9, chapter 4 and chapter 9 govern.

(c) Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Bills of Debt.

A bill of debt is a promissory note or a corporate debenture, not a bank account,

and is governed by the provisions of this chapter. In re Frazier, 136 Bankr. 199 (Bankr. W.D. Ark. 1991).

4-3-103. Definitions.

(a) In this chapter:

(1) "Acceptor" means a drawee who has accepted a draft.

(2) "Drawee" means a person ordered in a draft to make payment.

(3) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.

(4) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(5) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

(6) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one (1) or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(7) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or chapter 4.

(8) "Party" means a party to an instrument.

(9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(10) "Prove" with respect to a fact means to meet the burden of establishing the fact (§ 4-1-201(8)).

(11) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Acceptance". Section 4-3-409.

"Accommodated party". Section 4-3-419.

"Accommodation party". Section 4-3-419.

"Alteration". Section 4-3-407.

"Anomalous indorsement". Section 4-3-205.
"Blank indorsement". Section 4-3-205.
"Cashier's check". Section 4-3-104.
"Certificate of deposit". Section 4-3-104.
"Certified check". Section 4-3-409.
"Check". Section 4-3-104.
"Consideration". Section 4-3-303.
"Draft". Section 4-3-104.
"Holder in due course". Section 4-3-302.
"Incomplete instrument". Section 4-3-115.
"Indorsement". Section 4-3-204.
"Indorser". Section 4-3-204.
"Instrument". Section 4-3-104.
"Issue". Section 4-3-105.
"Issuer". Section 4-3-105.
"Negotiable instrument". Section 4-3-104.
"Negotiation". Section 4-3-201.
"Note". Section 4-3-104.
"Payable at a definite time". Section 4-3-108.
"Payable on demand". Section 4-3-108.
"Payable to bearer". Section 4-3-109.
"Payable to order". Section 4-3-109.
"Payment". Section 4-3-602.
"Person entitled to enforce". Section 4-3-301.
"Presentment". Section 4-3-501.
"Reacquisition". Section 4-3-207.
"Special indorsement". Section 4-3-205.
"Teller's check". Section 4-3-104.
"Transfer of instrument". Section 4-3-203.
"Traveler's check". Section 4-3-104.
"Value". Section 4-3-303.

(c) The following definitions in other chapters of this subtitle apply to this chapter:

"Bank". Section 4-4-105.
"Banking day". Section 4-4-104.
"Clearing house". Section 4-4-104.
"Collecting bank". Section 4-4-105.
"Depository bank". Section 4-4-105.
"Documentary draft". Section 4-4-104.
"Intermediary bank". Section 4-4-105.
"Item". Section 4-4-104.
"Payor bank". Section 4-4-105.
"Suspends payments". Section 4-4-104.

(d) In addition, chapter 1 of this subtitle contains general definitions and principles of construction and interpretation applicable throughout this chapter.

RESEARCH REFERENCES

UALR L.J. Arkansas Law Survey,
Harper, Business Law, 7 UALR L.J. 159.

CASE NOTES

Order.

Under subdivision (a)(6), an instrument which did not name a payee and was not payable to the bearer was neither a nego-

tiable nor nonnegotiable note. *Parker v. Pledger*, 269 Ark. 925, 601 S.W.2d 897 (1980) (decision under prior law).

4-3-104. Negotiable instrument.

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this chapter.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is

designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

Ark. L. Notes. Matthews, Interest Rate Provisions and the Negotiability of Commercial Paper, 1986 Ark. L. Notes 37.

UALR L.J. Arkansas Law Survey, Harper, Business Law, 7 UALR L.J. 159.

CASE NOTES

ANALYSIS

Drafts.

Letter of credit.

Mortgage note.

Signature.

Unconditional promise to pay.

Drafts.

Where a bill of exchange is drawn by the maker upon itself, the mere execution of the bill is deemed an acceptance of it and the holder has an option to treat the draft as an accepted bill or as a promissory note. *Canal Ins. Co. v. First Nat'l Bank*, 266 Ark. 1044, 596 S.W.2d 710 (Ct. App. 1979), *aff'd*, 268 Ark. 356, 596 S.W.2d 709 (1980) (decision under prior law).

Letter of Credit.

Letter of credit which did not contain an unconditional promise or order to pay, but, instead, payment was specifically conditioned upon receipt of a signed statement that the amount drawn was due in connection with a construction loan, was not a negotiable instrument. *City Nat'l Bank v. First Nat'l Bank & Trust Co.*, 22 Ark. App. 5, 732 S.W.2d 489 (1987) (decision under prior law).

Mortgage Note.

The creditor, as an assignee of the defendant's mortgage note, could not sue on the underlying debt the defendants owed to the original mortgagor; and for the creditor to have prevailed in enforcing the note, it was required either to produce the original or satisfy the requirements for a

lost negotiable instrument under § 4-3-309(a) and (b). *McKay v. Capital Resources Co.*, 327 Ark. 737, 940 S.W.2d 869 (1997).

Signature.

No person is liable on a negotiable instrument unless his signature appears on it. *Bank of Cave City v. Justice Farms, Inc.*, 297 Ark. 335, 761 S.W.2d 921 (1988) (decision under prior law).

One can be a holder in due course only of a negotiable instrument, and that instrument, among other things, must be signed by the maker or drawer. *Bank of Cave City v. Justice Farms, Inc.*, 297 Ark. 335, 761 S.W.2d 921 (1988) (decision under prior law).

Where defendant, in signing two notes, added the handwritten title "V. Pres." after his signatures on signature lines designated "individually", appellate court held that, based on the language of the notes and other evidence introduced at trial, the added title was merely descriptive and did not insulate defendant from individual liability. *Mollenhour v. State First Nat'l Bank*, 27 Ark. App. 176, 769 S.W.2d 28 (1989) (decision under prior law).

Unconditional Promise to Pay.

An instrument cannot be a note unless it contains an absolute and unconditional promise to pay money; therefore, a contract for construction of a building was not a note where the promise to pay money was conditioned by its very terms upon

the contractor's reciprocal promise to construct a metal building. *Pack v. Hill*, 18 Ark. App. 104, 710 S.W.2d 847 (1986) (decision under prior law).

Cited: *A.C.E., Inc. v. Inland Mtg. Co.*, 333 Ark. 232, 969 S.W.2d 176 (1998).

4-3-105. Issue of instrument.

(a) "Issue" means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.

(b) An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.

(c) "Issuer" applies to issued and unissued instruments and means a maker or drawer of an instrument.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Unconditional Promise to Pay.

An instrument cannot be a note unless it contains an absolute and unconditional promise to pay money; therefore, a contract for construction of a building was not a note where the promise to pay money

was conditioned by its very terms upon the contractor's reciprocal promise to construct a metal building. *Pack v. Hill*, 18 Ark. App. 104, 710 S.W.2d 847 (1986) (decision under prior law).

4-3-106. Unconditional promise or order.

(a) Except as provided in this section, for the purposes of § 4-3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of § 4-3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable

statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of § 4-3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

ALR. Negotiability of instrument providing for variable rate of interest under UCC § 3-106. 69 ALR 4th 1127.

CASE NOTES

ANALYSIS

Bank draft.

Conditional promise to pay.

Bank Draft.

The inclusion of the words "Upon Acceptance" and "Payable Through" a specified bank in a draft drawn upon its maker did not make the draft conditional. *Canal Ins. Co. v. First Nat'l Bank*, 266 Ark. 1044, 596 S.W.2d 710 (Ark. App. 1979), *aff'd*, 268 Ark. 356, 596 S.W.2d 709 (1980) (decision under prior law).

Conditional Promise to Pay.

An instrument cannot be a note unless it contains an absolute and unconditional promise to pay money; therefore, a contract for construction of a building was not a note where the promise to pay money was conditioned by its very terms upon the contractor's reciprocal promise to construct a metal building. *Pack v. Hill*, 18 Ark. App. 104, 710 S.W.2d 847 (1986) (decision under prior law).

4-3-107. Instrument payable in foreign money.

Unless the instrument otherwise provides, an instrument that states the amount payable in foreign money may be paid in the foreign money or in an equivalent amount in dollars calculated by using the current bank-offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid.

History. Acts 1991, No. 572, § 5.

4-3-108. Payable on demand or at definite time.

(a) A promise or order is "payable on demand" if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment.

(b) A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (i) prepayment, (ii) acceleration, (iii) extension at the option of the holder, or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(c) If an instrument, payable at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Consent to Extension.

Provisions in note which read: "Each Signer Liable. If there is more than one person signing this note each will be jointly and individually liable for the whole obligation. Each will pay the note if you agree with the other to renew or extend it, revise its terms or release any security" could not reasonably be construed to unambiguously grant consent to unlimited extensions. "Each signer liable" provision in note was construed to mean that signers remain liable on the note even if they agree among themselves to release the other upon a renewal, extension, revision, or release of security, and signer who did not consent to extension was relieved of liability. *Sanders v. Stephens Sec. Bank*, 75 Bankr. 746 (Bankr. W.D. Ark. 1987) (decision under prior law).

"Endorsement — secured" clause which provides that "the time of payment of said note or of any of the security therefor may be extended, or the rate of interest changed without notice to or further assent from the undersigned, and that the undersigned will remain bound hereon notwithstanding such change, substitution, surrender or extension," grants consent by signer to extension of the due date, but the provision cannot reasonably be construed to unambiguously grant consent to unlimited extensions. Because the extension term is ambiguous, this section limits the consent of the signer to one extension. *Sanders v. First Nat'l Bank*, 75 Bankr. 751 (Bankr. W.D. Ark. 1987) (decision under prior law).

"Obligations independent" provision which provides that "you may ... renew this ... without affecting my obligation to pay the loan amount" can reasonably be construed to grant consent to renew the note. The language does not unambiguously grant consent to unlimited extensions, and the note contains no language

such as "all extensions, extensions or extend the note from time to time" which would grant consent to unlimited extensions; therefore, consent to extend the note is limited to one extension pursuant to this section. *Sanders v. Merchants & Planters Bank*, 75 Bankr. 757 (Bankr. W.D. Ark. 1987) (decision under prior law).

Comaker's liability on note had to be found in note itself, and not accompanying mortgage, and where the due date of the note was extended without the comaker's consent, and the extension was not provided for in the note, that party was discharged from liability even though the comaker had signed the mortgage which provided that "This conveyance is given as a Mortgage for the purpose of securing: (a) The payment of 1 Promissory Note(s) of even date herewith and all extensions and renewals of the indebtedness." *Sanders v. Merchants & Planters Bank*, 75 Bankr. 761 (Bankr. W.D. Ark. 1987) (decision under prior law).

An express provision for consent in a note would be binding on the accommodation maker and would authorize one extension for a period not longer than the term of the original note, unless otherwise specified. *McIlroy Bank & Trust v. Maestri*, 297 Ark. 130, 759 S.W.2d 808 (1988) (decision under prior law).

Where one extension of note was authorized by the guarantor or accommodation maker in between two extensions which were not authorized by him, the third extension, which he signed, did not have the effect of permitting an unauthorized fourth extension for the same period as the authorized third extension. *Rogers v. Merchants & Planters Bank*, 302 Ark. 353, 789 S.W.2d 463 (1990) (decision under prior law).

Where a bank chose to extend a loan obligation four times with only the accommodation maker's agreement, it effec-

tively released the primary maker pursuant to former § 4-3-606(1)(a) (now see § 4-3-605(c)). *Mobley v. Harmon*, 304 Ark. 500, 803 S.W.2d 900 (1991) (decision under prior law).

Cited: *Landreth v. First Nat'l Bank*, 45 F.3d 267 (8th Cir. 1995).

4-3-109. Payable to bearer or to order.

(a) A promise or order is payable to bearer if it:

(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

(2) Does not state a payee; or

(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

(c) An instrument payable to bearer may become payable to an identified person if it is specially indorsed pursuant to § 4-3-205(a). An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to § 4-3-205(b).

History. Acts 1991, No. 572, § 5.

4-3-110. Identification of person to whom instrument is payable.

(a) The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person. If more than one (1) person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one (1) or more of the signers.

(b) If the signature of the issuer of an instrument is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.

(c) A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:

(1) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the named person, whether or not that person is the owner of the account identified by number.

(2) If an instrument is payable to:

(i) a trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

(ii) a person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative;

(iii) a fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization; or

(iv) an office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.

(d) If an instrument is payable to two (2) or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two (2) or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two (2) or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

History. Acts 1991, No. 572, § 5.

4-3-111. Place of payment.

Except as otherwise provided for items in chapter 4, an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one (1) place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker.

History. Acts 1991, No. 572, § 5.

4-3-112. Interest.

(a) Unless otherwise provided in the instrument, (i) an instrument is not payable with interest, and (ii) interest on an interest-bearing instrument is payable from the date of the instrument.

(b) Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information

not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

Ark. L. Notes. Matthews, Interest Rate Provisions and the Negotiability of Commercial Paper, 1986 Ark. L. Notes 37.

4-3-113. Date of instrument.

(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in § 4-4-401(c), an instrument payable on demand is not payable before the date of the instrument.

(b) If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder.

History. Acts 1991, No. 572, § 5.

4-3-114. Contradictory terms of instrument.

If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

In general.
Check imprinting machine.

In General.

Words prevail over numbers. *France v. Ford Motor Credit Co.*, 323 Ark. 167, 913 S.W.2d 770 (1996).

Check Imprinting Machine.

Because a check imprinting machine's purpose is to protect against alterations, the amount shown on the imprint should control whether the number is in words or figures. *Galatia Community State Bank v. Kindy*, 307 Ark. 467, 821 S.W.2d 765 (1991) (decision under prior law).

4-3-115. Incomplete instrument.

(a) "Incomplete instrument" means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers.

(b) Subject to subsection (c), if an incomplete instrument is an instrument under § 4-3-104, it may be enforced according to its terms

if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under § 4-3-104, but, after completion, the requirements of § 4-3-104 are met, the instrument may be enforced according to its terms as augmented by completion.

(c) If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under § 4-3-407.

(d) The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person asserting the lack of authority.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Omissions.

A note was not incomplete merely because the amount of annual installment was left blank, but such omission simply indicates that annual installments were not contemplated and the entire amount

of the note was due one year after the date. *Bryan v. Bartlett*, 435 F.2d 28 (8th Cir. 1970), cert. denied, 402 U.S. 915, 91 S. Ct. 1373, 28 L. Ed. 2d 658 (1971) (decision under prior law).

4-3-116. Joint and several liability — Contribution.

(a) Except as otherwise provided in the instrument, two (2) or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in § 4-3-419(e) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

(c) Discharge of one (1) party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of a party having the same joint and several liability to receive contribution from the party discharged.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Cited: *Integon Indem. Corp. v. Bull*, 311 Ark. 61, 842 S.W.2d 1 (1992).

4-3-117. Other agreements affecting instrument.

Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to

enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Negotiability.

The mere reference to the transaction giving rise to the instruments does not

affect negotiability. *Federal Factors, Inc. v. Wellbanke*, 241 Ark. 44, 406 S.W.2d 712 (1966) (decision under prior law).

4-3-118. Statute of limitations.

(a) Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within five (5) years after the due date or dates stated in the note or, if a due date is accelerated, within five (5) years after the accelerated due date.

(b) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within five (5) years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten (10) years.

(c) Except as provided in subsection (d), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three (3) years after dishonor of the draft or ten (10) years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three (3) years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within five (5) years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within five (5) years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six (6) years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money

had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three (3) years after the cause of action accrues.

History. Acts 1991, No. 572, § 5; 1997, No. 1164, § 1.

substituted “five (5) years” for “six (6) years” throughout the section.

Amendments. The 1997 amendment

CASE NOTES

Certificate of Deposit.

Under § 4-3-104(j), a certificate of deposit is a negotiable instrument, and an action to enforce such an instrument under this chapter would be subject to the six-year limitation period under subsection (e) of this section, not the five-year limitation period under § 16-56-111. *Ernest F. Loewer, Jr. Farms, Inc. v. National Bank*, 316 Ark. 54, 870 S.W.2d 726 (1994).

A demand is required to trigger the statute of limitations for a certificate of deposit (CD), regardless of whether the CD is a demand or due date CD. *Landreth v. First Nat'l Bank*, 45 F.3d 267 (8th Cir. 1995).

The trial court erred by construing subsection (e) to require a demand for payment be within a reasonable amount of time. *Landreth v. First Nat'l Bank*, 45 F.3d 267 (8th Cir. 1995).

Whether a certificate of deposit (CD) is a demand or due date CD is immaterial for the purpose of determining when the statute of limitations begins to run; the dispositive fact is whether or not the instrument is a CD. *Landreth v. First Nat'l Bank*, 45 F.3d 267 (8th Cir. 1995).

Cited: *United States Fid. & Guar. Co. v. Bank of Bentonville*, 29 F. Supp. 2d 553 (W.D. Ark. 1998).

4-3-119. Notice of right to defend action.

In an action for breach of an obligation for which a third person is answerable over pursuant to this chapter or chapter 4 the defendant may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over. If the notice states (i) that the person notified may come in and defend and (ii) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two (2) litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend.

History. Acts 1991, No. 572, § 5.

PART 2 — NEGOTIATION, TRANSFER, AND INDORSEMENT

SECTION.

4-3-201. Negotiation.

4-3-202. Negotiation subject to rescission.

4-3-203. Transfer of instrument — Rights acquired by transfer.

4-3-204. Indorsement.

SECTION.

4-3-205. Special indorsement — Blank indorsement — Anomalous indorsement.

4-3-206. Restrictive indorsement.

4-3-207. Reacquisition.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 10
UALR L.J. 89.

4-3-201. Negotiation.

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Gifts.

Indorsement.

Gifts.

While indorsement of a note payable "to order" is required to negotiate it in favor of one who becomes a holder in due course, a donor's rights in such an instrument may be transferred by gift without indorsement. *Brown v. Bell*, 291 Ark. 116,

722 S.W.2d 592 (1987) (decision under prior law).

Indorsement.

Assertion that indorsement was required before a promissory note could be transferred was erroneous, since negotiation of an instrument cannot be equated with mere transfer, as defined in this section. *Tackett v. First Sav.*, 306 Ark. 15, 810 S.W.2d 927 (1991) (decision under prior law).

4-3-202. Negotiation subject to rescission.

(a) Negotiation is effective even if obtained (i) from an infant, a corporation exceeding its powers, or a person without capacity, (ii) by fraud, duress, or mistake, or (iii) in breach of duty or as part of an illegal transaction.

(b) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

History. Acts 1991, No. 572, § 5.

4-3-203. Transfer of instrument — Rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 14
UALR L.J. 735.

CASE NOTES**ANALYSIS**

Assignments.

Gifts.

Indorsement.

Notice of defenses.

Rights of transferees.

Assignments.

The UCC does not permit assignments of negotiable instruments. *McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972) (decision under prior law).

Gifts.

While indorsement of a note payable "to order" is required to negotiate it in favor of one who becomes a holder in due course, a donor's rights in such an instrument may be transferred by gift without indorsement. *Brown v. Bell*, 291 Ark. 116, 722 S.W.2d 592 (1987) (decision under prior law).

Decedent made an inter vivos gift and delivery of a promissory note to his wife where there was an indorsement on the back of the note in favor of the wife and where the decedent declared "to the world" that he had assigned the note and deed of trust to his wife by recording the assignment to her of the deed of trust. *Chalmers v. Chalmers*, 327 Ark. 141, 937 S.W.2d 171 (1997).

Indorsement.

Assertion that indorsement was required before a promissory note could be transferred was erroneous, since negotiation of an instrument cannot be equated with mere transfer, as defined in § 4-3-201. *Tackett v. First Sav.*, 306 Ark. 15, 810 S.W.2d 927 (1991) (decision under prior law).

Notice of Defenses.

Where assignor knew that the makers of note had claims against him far in excess of the amount of the note and

assignee had notice that payments on the note were overdue at the time he took the note, assignee was not a holder in due course; therefore, the note was subject to the defense by the makers against assignor, and it was proper for the court to allow set-off, cancel and satisfy the note, and dismiss assignee's claim. *Richardson v. Girner*, 282 Ark. 302, 668 S.W.2d 523 (1984) (decision under prior law).

Rights of Transferees.

Mother became transferee and possessed all the rights of the lender includ-

ing right to foreclose on the mortgage, when she paid a debt owed by them and secured by a mortgage on their property and received from the lender's wife the unendorsed note and the mortgage. *Griffith v. Griffith*, 250 Ark. 845, 467 S.W.2d 737 (1971) (decision under prior law).

Cited: *UMLIC 2 Funding Corp. v. Butcher*, 333 Ark. 442, 970 S.W.2d 211 (1998); *Federal Fin. Co. v. Noe*, 335 Ark. 78, 983 S.W.2d 107 (1998).

4-3-204. Indorsement.

(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

(b) "Indorser" means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Failure to indorse.
Transfer shown.

Failure to Indorse.

Pledgee of note was not "holder in due course" where the note pledged to it was never indorsed as required by this section. *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (E.D. Ark. 1972) (decision under prior law).

Transfer Shown.

Decedent made an inter vivos gift and delivery of a promissory note to his wife where there was an indorsement on the back of the note in favor of the wife and where the decedent declared "to the world" that he had assigned the note and deed of trust to his wife by recording the assignment to her of the deed of trust. *Chalmers v. Chalmers*, 327 Ark. 141, 937 S.W.2d 171 (1997).

4-3-205. Special indorsement — Blank indorsement — Anomalous indorsement.

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a “special indorsement.” When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. The principles stated in § 4-3-110 apply to special indorsements.

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a “blank indorsement.” When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.

(d) “Anomalous indorsement” means an indorsement made by a person who is not the holder of the instrument. An anomalous indorsement does not affect the manner in which the instrument may be negotiated.

History. Acts 1991, No. 572, § 5.

4-3-206. Restrictive indorsement.

(a) An indorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument.

(b) An indorsement stating a condition to the right of the indorsee to receive payment does not affect the right of the indorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled.

(c) If an instrument bears an indorsement (i) described in § 4-4-201(b), or (ii) in blank or to a particular bank using the words “for deposit,” “for collection,” or other words indicating a purpose of having the instrument collected by a bank for the indorser or for a particular account, the following rules apply:

(1) A person, other than a bank, who purchases the instrument when so indorsed converts the instrument unless the amount paid for the instrument is received by the indorser or applied consistently with the indorsement.

(2) A depository bank that purchases the instrument or takes it for collection when so indorsed converts the instrument unless the amount paid by the bank with respect to the instrument is received by the indorser or applied consistently with the indorsement.

(3) A payor bank that is also the depository bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the indorser or applied consistently with the indorsement.

(4) Except as otherwise provided in paragraph (3), a payor bank or intermediary bank may disregard the indorsement and is not liable if the proceeds of the instrument are not received by the indorser or applied consistently with the indorsement.

(d) Except for an indorsement covered by subsection (c), if an instrument bears an indorsement using words to the effect that payment is to be made to the indorsee as agent, trustee, or other fiduciary for the benefit of the indorser or another person, the following rules apply:

(1) Unless there is notice of breach of fiduciary duty as provided in § 4-3-307, a person who purchases the instrument from the indorsee or takes the instrument from the indorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the indorsee without regard to whether the indorsee violates a fiduciary duty to the indorser.

(2) A subsequent transferee of the instrument or person who pays the instrument is neither given notice nor otherwise affected by the restriction in the indorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty.

(e) The presence on an instrument of an indorsement to which this section applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under subsection (c) or has notice or knowledge of breach of fiduciary duty as stated in subsection (d).

(f) In an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an indorsement to which this section applies and the payment is not permitted by this section.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Negligence.

Bank was negligent in allowing cash withdrawals against checks deposited with the indorsement "For Deposit Only."

J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853 (1992).

4-3-207. Reacquisition.

Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel indorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the

instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An indorser whose indorsement is cancelled is discharged, and the discharge is effective against any subsequent holder.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Enforcement Against Maker.

When a former holder of a note reacquires the instrument, only intervening parties are discharged and the holder of

the instrument may enforce payment against the maker. *K. & S. Int'l, Inc. v. Howard*, 249 Ark. 901, 462 S.W.2d 458 (1971) (decision under prior law).

PART 3 — ENFORCEMENT OF INSTRUMENTS

SECTION.

4-3-301. Person entitled to enforce instrument.

4-3-302. Holder in due course.

4-3-303. Value and consideration.

4-3-304. Overdue instrument.

4-3-305. Defenses and claims in recoupment.

4-3-306. Claims to an instrument.

4-3-307. Notice of breach of fiduciary duty.

SECTION.

4-3-308. Proof of signatures and status as holder in due course.

4-3-309. Enforcement of lost, destroyed, or stolen instrument.

4-3-310. Effect of instrument on obligation for which taken.

4-3-311. Accord and satisfaction by use of instrument.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. Taking instrument in good faith, and without notice of infirmities or defenses: holder-in-due-course status, under UCC § 3-302. 36 ALR 4th 212.

What constitutes "dealing" under UCC § 3-305(2), providing that holder in due course takes instrument free from all de-

fenses of any party to instrument with whom holder has not dealt. 42 ALR 5th 137.

UALR L.J. Jenkins, Arkansas's Revised Article 3: User Caution Advised!!; 16 UALR L.J. 573.

4-3-301. Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 4-3-309 or § 4-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Defenses.

Reacquired instruments.

Defenses.

Where assignee was not a holder in due course, the note was subject to defense by the makers against assignor, and it was proper for the court to allow set-off, cancel and satisfy the note, and dismiss assignee's claim. *Richardson v. Girner*, 282 Ark. 302, 668 S.W.2d 523 (1984) (decision under prior law).

Reacquired Instruments.

When a former holder of a note reacquires the instrument, only intervening parties are discharged and the holder of the instrument may enforce payment against the maker. *K. & S. Int'l, Inc. v. Howard*, 249 Ark. 901, 462 S.W.2d 458 (1971) (decision under prior law).

Cited: *McKay v. Capital Resources Co.*, 327 Ark. 737, 940 S.W.2d 869 (1997).

4-3-302. Holder in due course.

(a) Subject to subsection (c) and § 4-3-106(d), "holder in due course" means the holder of an instrument if:

(1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in § 4-3-306, and (vi) without notice that any party has a defense or claim in recoupment described in § 4-3-305(a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding, (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

(d) If, under § 4-3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(e) If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

(g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

Ark. L. Notes. Laurence, *Bona Fide Purchaser Analysis*, Beverage Products Corporation v. Robinson and the Case Against Very Short Opinions, 1990 Ark. L. Notes 85.

Ark. L. Rev. Bills and Notes — The Original Payee's Non-Compliance With the Wingo Act as a Defense Against a Holder in Due Course, 25 Ark. L. Rev. 518.

CASE NOTES

ANALYSIS

Assignees of notes.

Burden of proof.

Business under assumed name.

False representations.

Good faith.

Illegal or void transactions.

Notice of defenses.

Payees.

Pledges.

Assignees of Notes.

The assignee of a note was a holder in due course. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968) (decision under prior law).

Where the maker delivered blank notes to payee who assigned them to bank without maker's knowledge and these notes were neither overdue nor dishonored and received by bank in good faith, the bank was holder in due course. *Byrd v. Security Bank*, 250 Ark. 214, 464 S.W.2d 578 (1971) (decision under prior law).

Burden of Proof.

Surety had burden of proving that purported transactions concerning execution of note and mortgage which surety sought to foreclose were the genuine actions of

corporate board before it could rely on this or any other provision of the UCC (subtitle 1 of this title). *National Sur. Corp. v. Crystal Springs Fishing Village, Inc.*, 326 F. Supp. 1171 (W.D. Ark. 1971) (decision under prior law).

Business Under Assumed Name.

Any violation of statutes restricting the transacting of business under an assumed name (§ 4-70-201 et seq.) was irrelevant to the issue of whether the holder receiving notes from company allegedly violating such sections was a holder in due course. *Byrd v. Security Bank*, 250 Ark. 214, 464 S.W.2d 578 (1971) (decision under prior law).

False Representations.

A bank payee was not disqualified from being a holder in due course by the fact that one of its vice-presidents induced the makers to borrow the money to purchase stock from him and others in a corporation which he falsely represented to be solvent and well-managed. *City Nat'l Bank v. Vanderboom*, 290 F. Supp. 592 (W.D. Ark. 1968), *aff'd*, 422 F.2d 221 (8th Cir.), *cert. denied*, 399 U.S. 905, 90 S. Ct. 2196, 26 L. Ed. 2d 560 (1970) (decision under prior law).

Good Faith.

Where a bank employee changed the handwritten amount portion on the check so that it was consistent with the sum set out by the impression of a check writing machine, the bank took the check in "good faith" and was a holder in due course because it was entitled to rely on the imprinted section of the check, and the "alteration" which reconciled the terms was not a sufficient basis to hold that the bank acted in other than good faith. *Galatia Community State Bank v. Kindy*, 307 Ark. 467, 821 S.W.2d 765 (1991) (decision under prior law).

Illegal or Void Transactions.

There can be no holder in due course of a negotiable instrument arising out of an illegal transaction. *Pacific Nat'l Bank v. Henreich*, 240 Ark. 114, 398 S.W.2d 221 (1966) (decision under prior law).

Notice of Defenses.

The fact that one who accepts a cashier's check in satisfaction of an antecedent debt may suspect the creditor may be insolvent does not prevent the creditor's being a holder in due course. *Nicklaus v. Peoples Bank & Trust Co.*, 258 F. Supp. 482 (E.D. Ark. 1965), *aff'd*, 369 F.2d 683 (8th Cir. 1966) (decision under prior law).

Where the defendant insurance company's draft contained all the elements of negotiability and was not drawn without recourse, and the evidence showed that the plaintiff bank did not have notice of any defense of the insurance company against the instrument, the bank was a holder in due course. *Canal Ins. Co. v. First Nat'l Bank*, 266 Ark. 1044, 596 S.W.2d 710 (Ct. App. 1979), *aff'd*, 268 Ark. 356, 596 S.W.2d 709 (1980) (decision under prior law).

Where assignor knew that the makers of note had claims against him far in excess of the amount of the note and assignee had notice that payments on the

note were overdue at the time he took the note, assignee was not a holder in due course; therefore, the note was subject to the defense by the makers against assignor, and it was proper for the court to allow set-off, cancel and satisfy the note, and dismiss assignee's claim. *Richardson v. Girner*, 282 Ark. 302, 668 S.W.2d 523 (1984) (decision under prior law).

Assignee was not a holder in due course even though the note was not declared to be in default until after he contacted the maker; it is not necessary to have the holder of the note declare that it is in default when this fact is obvious in other ways. *Richardson v. Girner*, 282 Ark. 302, 668 S.W.2d 523 (1984) (decision under prior law).

Payees.

A bank payee was not disqualified from being a holder in due course by the fact that one of its vice-presidents induced the makers to borrow the money to purchase stock from him and others in a corporation which he falsely represented to be solvent and well-managed. *City Nat'l Bank v. Vanderboom*, 290 F. Supp. 592 (W.D. Ark. 1968), *aff'd*, 422 F.2d 221 (8th Cir.), *cert. denied*, 399 U.S. 905, 90 S. Ct. 2196, 26 L. Ed. 2d 560 (1970) (decision under prior law).

Pledges.

Pledges, in a securities transaction, were holders in due course and held their notes free from all defenses of any party with whom they had not dealt, except a defense based on illegality of the transaction which would render it a nullity. *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (E.D. Ark. 1972) (decision under prior law).

Cited: *Landreth v. First Nat'l Bank*, 45 F.3d 267 (8th Cir. 1995); *Terry v. Rice (In re Cheqnet Sys.)*, 246 Bankr. 873 (Bankr. E.D. Ark. 2000).

4-3-303. Value and consideration.

(a) An instrument is issued or transferred for value if:

- (1) the instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;
- (2) the transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

(3) the instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(4) the instrument is issued or transferred in exchange for a negotiable instrument; or

(5) the instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Antecedent debts.
Antecedent obligations.
Blank notes.

Antecedent Debts.

Where bank takes a negotiated instrument in satisfaction of an antecedent debt, the bank is a holder for value and in due course. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. 1964) (decision under prior law).

Antecedent Obligations.

Where a promissory note and a deed of trust were executed by an individual to remove a lien created by a judgment obtained against him, but the evidence showed that the judgment was void ab initio for lack of proper service, the bank

holding the note failed to demonstrate an antecedent obligation for which the promissory note and deed of trust were given and the transaction did not fit within the exception of the defense of want or failure of consideration. *Federal Land Bank v. Wilson*, 533 F. Supp. 301 (E.D. Ark. 1982), *aff'd*, 719 F.2d 1367 (8th Cir. 1983) (decision under prior law).

Blank Notes.

Where blank notes were delivered by maker to payee who filled in and assigned these notes to bank without knowledge or consent of maker, as consideration for release of prior notes, bank took them for value. *Byrd v. Security Bank*, 250 Ark. 214, 464 S.W.2d 578 (1971) (decision under prior law).

4-3-304. Overdue instrument.

(a) An instrument payable on demand becomes overdue at the earliest of the following times:

(1) on the day after the day demand for payment is duly made;

(2) if the instrument is a check, ninety (90) days after its date; or

(3) if the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.

(b) With respect to an instrument payable at a definite time the following rules apply:

(1) If the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue upon default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured.

(2) If the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date.

(3) If a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date.

(c) Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal.

History. Acts 1991, No. 572, § 5.

4-3-305. Defenses and claims in recoupment.

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) a defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) a defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) a claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (§ 4-3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due

course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

ALR. What constitutes “dealing” under UCC § 3-305(2), providing that holder in due course takes instrument free from all defenses of any party to instrument with whom holder has not dealt. 42 ALR 5th 137.

CASE NOTES

Completion of Instrument.

A purchaser of a commercial instrument is entitled to the status of a holder in due course even though he knows that the possessor of the signed instrument filled in the blanks, unless, as set out in this section, the purchaser has notice that the

instrument was improperly completed. *Cook v. Southern Credit Corp.*, 247 Ark. 981, 448 S.W.2d 634 (1970) (decision under prior law).

Cited: *Terry v. Rice* (In re Cheqnet Sys.), 246 Bankr. 873 (Bankr. E.D. Ark. 2000).

4-3-306. Claims to an instrument.

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

History. Acts 1991, No. 572, § 5.

4-3-307. Notice of breach of fiduciary duty.

(a) In this section:

(1) “Fiduciary” means an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument.

(2) “Represented person” means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in paragraph (1) is owed.

(b) If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to

the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person.

(2) In the case of an instrument payable to the represented person or the fiduciary, as such, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

(3) If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty.

(4) If an instrument is issued by the represented person or the fiduciary, as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

History. Acts 1991, No. 572, § 5.

4-3-308. Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under § 4-3-402(a).

(b) If the validity of signatures is admitted or proved and there is compliance with subsection (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under § 4-3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Production of instrument.
Signatures.

Production of Instrument.

Where there was no evidence the note was accepted in payment of the debt, if the debt was not paid when the note became due, suit could be maintained on either the note or the account; however, it was necessary for the creditor to produce and surrender the note in court to be entitled

to a judgment on the open account. *Skelton v. Farm Serv. Coop.*, 266 Ark. 827, 587 S.W.2d 76 (Ct. App. 1979) (decision under prior law).

Signatures.

Where the signatures on the commercial instrument on which suit was brought were not specifically denied in the pleadings, they stood as admitted. *BWH, Inc. v. Metropolitan Nat'l Bank*, 267 Ark. 182, 590 S.W.2d 247 (1979) (decision under prior law).

4-3-309. Enforcement of lost, destroyed, or stolen instrument.

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, § 4-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Joint payee.
Photocopy held insufficient.

Joint Payee.

This section did not provide a remedy to a joint payee on a check where the joint payee gave the check to the other joint payee to indorse, and the other joint payee refused to return the check and later cashed it and retained the proceeds.

A.C.E., Inc. v. Inland Mtg. Co., 333 Ark. 232, 969 S.W.2d 176 (1998).

Photocopy Held Insufficient.

The creditor, as an assignee of the defendant's mortgage note, could not sue on the underlying debt the defendants owed to the original mortgagor; and for the creditor to have prevailed in enforcing the note, it was required either to produce the original or satisfy the requirements for a lost negotiable instrument under subsec-

tions (a) and (b). *McKay v. Capital Resources Co.*, 327 Ark. 737, 940 S.W.2d 869 (1997).

4-3-310. Effect of instrument on obligation for which taken.

(a) Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in paragraph (4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) is taken for an obligation, the effect is (i) that stated in subsection (a) if the instrument is one on which a bank is liable as maker or acceptor, or (ii) that stated in subsection (b) in any other case.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

In general.

Effect of transfer.

In General.

This section does no more than recognize the uncertainty attendant upon an uncertified and unpaid check and suspends the obligation until that uncertainty is resolved. *France v. Ford Motor*

Credit Co., 323 Ark. 167, 913 S.W.2d 770 (1996).

Effect of Transfer.

Under subdivision (b)(3), an obligee may enforce either the note or the debt; however, when the note is transferred to a third party the only right that survives is the right subdivision (b)(4) to enforce the note. *McKay v. Capital Resources Co.*, 327 Ark. 737, 940 S.W.2d 869 (1997).

4-3-311. Accord and satisfaction by use of instrument.

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within ninety (90) days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This subdivision does not apply if the claimant is an organization that sent a statement complying with (c)(1)(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 14
UALR L.J. 735.

CASE NOTES

Acceptance of Payment.

Generally, acceptance by a creditor of a check offered by the debtor in full payment of a disputed claim is an accord and satisfaction of the claim; a payee is estopped to deny an account has been paid in full where, after a dispute as to the amount due, a payee accepts and cashes a check that recites that it is in settlement of the account. *Hardison v. Jackson*, 45 Ark. App. 49, 871 S.W.2d 410 (1994).

Where the uncontroverted evidence

plainly showed that defendants disputed the amount they owed plaintiff when plaintiff accepted defendants' check, the defendants proved their defense of accord and satisfaction and the chancellor's award of damages and attorney's fees in favor of plaintiff was clearly erroneous. *Hardison v. Jackson*, 45 Ark. App. 49, 871 S.W.2d 410 (1994).

Cited: *Landreth v. First Nat'l Bank*, 45 F.3d 267 (8th Cir. 1995).

PART 4 — LIABILITY OF PARTIES

SECTION.

- 4-3-401. Signature.
- 4-3-402. Signature by representative.
- 4-3-403. Unauthorized signature.
- 4-3-404. Impostors — Fictitious payees.
- 4-3-405. Employer's responsibility for fraudulent indorsement by employee.
- 4-3-406. Negligence contributing to forged signature or alteration of instrument.
- 4-3-407. Alteration.
- 4-3-408. Drawee not liable on unaccepted draft.
- 4-3-409. Acceptance of draft — Certified check.
- 4-3-410. Acceptance varying draft.

SECTION.

- 4-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.
- 4-3-412. Obligation of issuer of note or cashier's check.
- 4-3-413. Obligation of acceptor.
- 4-3-414. Obligation of drawer.
- 4-3-415. Obligation of indorser.
- 4-3-416. Transfer warranties.
- 4-3-417. Presentment warranties.
- 4-3-418. Payment or acceptance by mistake.
- 4-3-419. Instruments signed for accommodation.
- 4-3-420. Conversion of instrument.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. Construction and effect of UCC § 3-416 governing guaranty contracts. 10 ALR 4th 897.

Payee's right of recovery, in conversion under UCC § 3-419(1)(c), for money paid on unauthorized indorsement. 23 ALR 4th 855.

Construction and effect of "Padded pay-

roll" rule of UCC § 3-405. 45 ALR 5th 389.

Ark. L. Rev. Bank to Consumer Relations under the Uniform Commercial Code: Article IV, 16 Ark. L. Rev. 66.

UALR L.J. Jenkins, Arkansas's Revised Article 3: User Caution Advised!!, 16 UALR L.J. 573.

4-3-401. Signature.

(a) A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under § 4-3-402.

(b) A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas: Business Law, 6 UALR L.J. 73.

CASE NOTES

ANALYSIS

Printed names.
Signature.

Printed Names.

A bank which issues a personal money order cannot deny liability on the instrument based upon subsection (a) or (b) of this section, since the issuance of a money order with the bank's printed name evidences the bank's intent to be bound thereby. *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 621 S.W.2d 683 (1981) (decision under prior law).

Signature.

No person is liable on a negotiable instrument unless his signature appears on it. *Bank of Cave City v. Justice Farms, Inc.*, 297 Ark. 335, 761 S.W.2d 921 (1988) (decision under prior law).

One can be a holder in due course only of a negotiable instrument, and that instrument, among other things, must be signed by the maker or drawer. *Bank of Cave City v. Justice Farms, Inc.*, 297 Ark. 335, 761 S.W.2d 921 (1988) (decision under prior law).

4-3-402. Signature by representative.

(a) If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument.

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.

(2) Subject to subsection (c), if (i) the form of the signature does not show unambiguously that the signature is made in a representative

capacity or (ii) the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

(c) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 10
UALR L.J. 89.

CASE NOTES

ANALYSIS

Corporate officers.
Failure to name person represented.
Failure to show representative capacity.
Harmless error.
Parol evidence.
Personal liability.
Pleading.

Corporate Officers.

The signature of a corporation secretary on a note with the name of the corporation typed above his signature, but with nothing on the note to indicate his office or the capacity in which he signed was insufficient to avoid personal liability on the part of such officer. *Fanning v. Hembree Oil Co.*, 245 Ark. 825, 434 S.W.2d 822 (1968) (decision under prior law).

Where the president of a corporation signed a bank note for the corporation on the face of the note, and also personally signed the note on the reverse side, the president was an endorser of the note, not a co-maker, as there was no clear indication that the note was signed in some other capacity as required by this section. *Merchants Nat'l Bank v. Blass*, 282 Ark. 497, 669 S.W.2d 195 (1984) (decision under prior law).

Where defendant, in signing two notes, added the handwritten title "V. Pres." af-

ter his signatures on signature lines designated "individually", appellate court held that, based on the language of the notes and other evidence introduced at trial, the added title was merely descriptive and did not insulate defendant from individual liability. *Mollenhour v. State First Nat'l Bank*, 27 Ark. App. 176, 769 S.W.2d 28 (1989) (decision under prior law).

Failure to Name Person Represented.

One who co-signed a note and contract as "trustee" without disclosing on the instrument the identity of the trust was nevertheless personally obligated to an assignee of the note. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968) (decision under prior law).

Failure to Show Representative Capacity.

A corporation secretary's typing the name of the corporation above his signature on a note without anything to indicate his office or the capacity in which he signed was insufficient to avoid personal liability on the part of such officer. *Fanning v. Hembree Oil Co.*, 245 Ark. 825, 434 S.W.2d 822 (1968) (decision under prior law).

A signature is only in a representative capacity if the name of the organization is

preceded or followed by the name and office of an authorized individual; thus, although the name of the corporation preceded an individual's name, the office held by the individual was not indicated and therefore the defendant could not avoid personal liability even though he did not sign in the individual guaranty space on the reverse side of the note. *United Fasteners, Inc. v. First State Bank*, 286 Ark. 202, 691 S.W.2d 126 (1985) (decision under prior law).

Harmless Error.

Although a part of the instructions could be construed to be in conflict with this section, the error was harmless where the court gave this section in another instruction. *Peoples Bank & Trust Co. v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986) (decision under prior law).

Parol Evidence.

In an action between the immediate parties to the instrument, this section allows an agent who has signed a negotiable instrument to introduce parol evidence to establish that personal liability on his part was not intended. *Evelyn Hills Pharmacy, Inc. v. First Nat'l Bank*, 289 Ark. 351, 712 S.W.2d 291 (1986) (decision under prior law).

Parol evidence may be used to show that the immediate parties intended for the named principal to be liable; therefore, although the signature on a note by an owner with a one-half interest in the pharmacy did not clearly show that the signature was on behalf of the purported principal, the parol evidence showed that all parties to the transaction intended that the pharmacy be liable as principal

because part of the proceeds were used to retire an earlier corporate note and the remaining \$20,000 was deposited in the pharmacy's account, and the pharmacy was held liable as principal. *Evelyn Hills Pharmacy, Inc. v. First Nat'l Bank*, 289 Ark. 351, 712 S.W.2d 291 (1986) (decision under prior law).

Personal Liability.

Where the guarantor signed his name after the corporate name, but there was no evidence, other than the guarantor's own statement, that he intended to sign in a representative capacity and that his failure to indicate "President" after his name was an oversight, the guarantor was personally liable. *Cleveland Chem. Co. v. Keller*, 19 Ark. App. 7, 716 S.W.2d 204 (1986) (decision under prior law).

Where defendant, in signing two notes, added the handwritten title "V. Pres." after his signatures on signature lines designated "individually", appellate court held that, based on the language of the notes and other evidence introduced at trial, the added title was merely descriptive and did not insulate defendant from individual liability. *Mollenhour v. State First Nat'l Bank*, 27 Ark. App. 176, 769 S.W.2d 28 (1989) (decision under prior law).

Pleading.

In a suit on a promissory note, a general denial foreclosed any claimed right defendant might have under this section to show the status under which he signed the note. *Chiles v. Mann & Mann, Inc.*, 240 Ark. 527, 400 S.W.2d 667 (1966) (decision under prior law).

4-3-403. Unauthorized signature.

(a) Unless otherwise provided in this chapter or § 4-4-401 et seq., an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this chapter.

(b) If the signature of more than one (1) person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one (1) of the required signatures is lacking.

(c) The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this chapter which

makes the unauthorized signature effective for the purposes of this chapter.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Agents.

Ratification.

Unjust enrichment.

Agents.

A signature by an agent in excess of his authority is an "unauthorized signature." *Pine Bluff Nat'l Bank v. Kesterson*, 257 Ark. 813, 520 S.W.2d 253 (1975) (decision under prior law).

Ratification.

When the payees, whose endorsements had been forged, accepted payments due them from the proceeds of the checks, the unauthorized endorsements became ratified. *Starkey Constr., Inc. v. Elcon, Inc.*, 248 Ark. 958, 457 S.W.2d 509 (1970) (decision under prior law).

Since this section does not define or explain ratification, it was not error for the court to go beyond this section to form the instruction. *Peoples Bank & Trust Co. v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986) (decision under prior law).

Unjust Enrichment.

Where husband forged wife's name on a promissory note and wife was unaware that her name had been signed to the note, and she accepted the benefits of what she thought was money her husband had obtained on a personal loan, and took no action that would indicate she intended to be bound by the note, finding that wife was not unjustly enriched was correct. *Merchants & Planters Bank & Trust Co. v. Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990) (decision under prior law).

4-3-404. Impostors — Fictitious payees.

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable (§ 4-3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(c) Under subsection (a) or (b), an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

History. Acts 1991, No. 572, § 5.

4-3-405. Employer's responsibility for fraudulent indorsement by employee.

(a) In this section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) "Responsibility" with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under subsection (b), an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name

substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to the name of that person.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

ALR. Construction and effect of "Padded payroll" rule of UCC § 3-405. 45 ALR 5th 389.

CASE NOTES

Good Faith of Bank.

A bank could assert that the statute relieved it of responsibility for checks improperly endorsed by an employee of a

depositor only if it acted in good faith. *United States Fid. & Guar. Co. v. Bank of Bentonville*, 29 F. Supp. 2d 553 (W.D. Ark. 1998).

4-3-406. Negligence contributing to forged signature or alteration of instrument.

(a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) Under subsection (a), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(c) Under subsection (a), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b), the burden of proving failure to exercise ordinary care is on the person precluded.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Checks.

Comparative fault.

Checks.

The alleged negligence of the issuer of a check in failing to timely stop payment on a check did not inure to the benefit of a joint payee of the check in its suit against the issuer, but instead could only be useful

as a defense the bank might use as a defendant to the extent that the issuer's negligence contributed to a loss. *A.C.E., Inc. v. Inland Mtg. Co.*, 333 Ark. 232, 969 S.W.2d 176 (1998).

Comparative Fault.

There was sufficient evidence to justify submitting to the jury the question of whether account holder's conduct after

the forgery contributed to her loss, and trial court erroneously denied the instruction based on subdivision (2) which would allow the jurors to compare the respective

fault of the parties in causing the loss. *Union Nat'l Bank v. Daneshvar*, 33 Ark. App. 171, 803 S.W.2d 567 (1991) (decision under prior law).

4-3-407. Alteration.

(a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(b) Except as provided in subsection (c), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(c) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Interest rate.

Remedy.

Validity between parties.

Interest Rate.

Alteration of interest rate was material, but not fraudulent. *Sanders v. Merchants & Planters Bank*, 75 Bankr. 757 (Bankr. W.D. Ark. 1987) (decision under prior law).

Remedy.

Although bank attached a "limiting memorandum" to note, the drastic remedy of discharge of debtors' entire obligation was not appropriate where limiting memorandum reflected the final loan as it was actually approved, and defendant knew of this limitation and continued to operate under it. *Slefco v. First Nat'l Bank*, 107

Bankr. 628 (Bankr. E.D. Ark. 1989) (decision under prior law).

Validity Between Parties.

Where the changes made in a promissory note were the result of the borrowers' request for credit life insurance and were effected with their assent, and the subsequent correction in the amount of the monthly payments was merely for the purpose of conforming the payments to the actual agreement of the parties, the various errors, discrepancies and corrections rendered the note non-negotiable, but did not affect the validity of the note between the parties, even though none of the errors were directly attributable to the borrowers. *Winkle v. Grand Nat'l Bank*, 267 Ark. 123, 601 S.W.2d 559, cert. denied, 449 U.S. 880, 101 S. Ct. 230, 66 L. Ed. 2d 104 (1980) (decision under prior law).

4-3-408. Drawee not liable on unaccepted draft.

A check or other draft does not of itself operate as an assignment of

funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

History. Acts 1991, No. 572, § 5.

4-3-409. Acceptance of draft — Certified check.

(a) "Acceptance" means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

(b) A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored.

(c) If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith.

(d) "Certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in subsection (a) or by a writing on the check which indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas: Business Law, 6 UALR L.J. 73.

Murphey, The Discontinuance of the

Certified Check — An Arkansas Study, 16 UALR L.J. 555.

CASE NOTES

ANALYSIS

Bill of exchange.

Issuance of money order.

Bill of Exchange.

Where a bill of exchange was drawn upon the maker itself, the mere execution of it is deemed an acceptance of it. *Canal Ins. Co. v. First Nat'l Bank*, 266 Ark. 1044, 596 S.W.2d 710 (Ark. App. 1979), *aff'd*, 268 Ark. 356, 596 S.W.2d 709 (1980) (decision under prior law).

Issuance of Money Order.

Where a bank issues a personal money order in exchange for a "hot" check drawn on insufficient funds, it may not deny liability on the money order on a theory that under this section it did not accept the instrument, since the bank accepted the instrument in advance by the act of its issuance, because it was an obligation of the bank from the moment of its sale and issuance. *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 621 S.W.2d 683 (1981) (decision under prior law).

4-3-410. Acceptance varying draft.

(a) If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the

draft as dishonored. In that case, the drawee may cancel the acceptance.

(b) The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place.

(c) If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and indorser that does not expressly assent to the acceptance is discharged.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Bill of exchange.

Issuance of money order.

Bill of Exchange.

Where a bill of exchange was drawn upon the maker itself, the mere execution of it is deemed an acceptance of it. *Canal Ins. Co. v. First Nat'l Bank*, 266 Ark. 1044, 596 S.W.2d 710 (Ark. App. 1979), *aff'd*, 268 Ark. 356, 596 S.W.2d 709 (1980) (decision under prior law).

Issuance of Money Order.

Where a bank issues a personal money order in exchange for a "hot" check drawn on insufficient funds, it may not deny liability on the money order on a theory that under this section it did not accept the instrument, since the bank accepted the instrument in advance by the act of its issuance, because it was an obligation of the bank from the moment of its sale and issuance. *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 621 S.W.2d 683 (1981) (decision under prior law).

4-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.

(a) In this section, "obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer.

(b) If the obligated bank wrongfully (i) refuses to pay a cashier's check or certified check, (ii) stops payment of a teller's check, or (iii) refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

(c) Expenses or consequential damages under subsection (b) are not recoverable if the refusal of the obligated bank to pay occurs because (i) the bank suspends payments, (ii) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument, (iii) the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument, or (iv) payment is prohibited by law.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

- UALR L.J.** Survey—Business Law, 14 Certified Check — An Arkansas Study, 16
UALR L.J. 735. **UALR L.J.** 555.
Murphey, The Discontinuance of the

4-3-412. Obligation of issuer of note or cashier's check.

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in §§ 4-3-115 and 4-3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under § 4-3-415.

History. Acts 1991, No. 572, § 5.

CASE NOTES**Issuance of Money Order.**

Where a bank issues a personal money order in exchange for a "hot" check drawn on insufficient funds, it may not deny liability on the money order on a theory that under this section it did not accept the instrument, since the bank accepted

the instrument in advance by the act of its issuance, because it was an obligation of the bank from the moment of its sale and issuance. *Sequoyah State Bank v. Union Nat'l Bank*, 274 Ark. 1, 621 S.W.2d 683 (1981) (decision under prior law).

4-3-413. Obligation of acceptor.

(a) The acceptor of a draft is obliged to pay the draft (i) according to its terms at the time it was accepted, even though the acceptance states that the draft is payable "as originally drawn" or equivalent terms, (ii) if the acceptance varies the terms of the draft, according to the terms of the draft as varied, or (iii) if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in §§ 4-3-115 and 4-3-407. The obligation is owed to a person entitled to enforce the draft or to the drawer or an indorser who paid the draft under § 4-3-414 or § 4-3-415.

(b) If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If (i) the certification or acceptance does not state an amount, (ii) the amount of the instrument is subsequently raised, and (iii) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

UALR L.J. Murphey, The Discontinuance of the Certified Check — An Arkansas Study, 16 UALR L.J. 555.

4-3-414. Obligation of drawer.

(a) This section does not apply to cashier's checks or other drafts drawn on the drawer.

(b) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in §§ 4-3-115 and 4-3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under § 4-3-415.

(c) If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.

(d) If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an indorser under § 4-3-415(a) and (c).

(e) If a draft states that it is drawn "without recourse" or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under subsection (b) to pay the draft if the draft is not a check. A disclaimer of the liability stated in subsection (b) is not effective if the draft is a check.

(f) If (i) a check is not presented for payment or given to a depository bank for collection within thirty (30) days after its date, (ii) the drawee suspends payments after expiration of the thirty-day period without paying the check, and (iii) because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer to the extent deprived of funds may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds.

History. Acts 1991, No. 572, § 5.

CASE NOTES**Discharge Upheld.**

The obligation of the issuer of a check was discharged at the time of payment, notwithstanding that one of the joint pay-

ees cashed the check and refused to pay an amount due to the other joint payee. *A.C.E., Inc. v. Inland Mtg. Co.*, 333 Ark. 232, 969 S.W.2d 176 (1998).

4-3-415. Obligation of indorser.

(a) Subject to subsections (b), (c), and (d) and to § 4-3-419(d), if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the

time it was indorsed, or (ii) if the indorser indorsed an incomplete instrument, according to its terms when completed, to the extent stated in §§ 4-3-115 and 4-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

(b) If an indorsement states that it is made "without recourse" or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) to pay the instrument.

(c) If notice of dishonor of an instrument is required by § 4-3-503 and notice of dishonor complying with that section is not given to an indorser, the liability of the indorser under subsection (a) is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) is discharged.

(e) If an indorser of a check is liable under subsection (a) and the check is not presented for payment, or given to a depositary bank for collection, within thirty (30) days after the day the indorsement was made, the liability of the indorser under subsection (a) is discharged.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

Ark. L. Rev. Bills and Notes — Qualified Indorsements, 18 Ark. L. Rev. 167.

4-3-416. Transfer warranties.

(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:

- (1) the warrantor is a person entitled to enforce the instrument;
- (2) all signatures on the instrument are authentic and authorized;
- (3) the instrument has not been altered;
- (4) the instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; and
- (5) the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(b) A person to whom the warranties under subsection (a) are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(d) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

History. Acts 1991, No. 572, § 5.

4-3-417. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) the warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) the draft has not been altered; and

(3) the warrantor has no knowledge that the signature of the drawer of the draft is unauthorized.

(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under § 4-3-404 or § 4-3-405 or the drawer is precluded under § 4-3-406 or § 4-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument;

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

History. Acts 1991, No. 572, § 5.

4-3-418. Payment or acceptance by mistake.

(a) Except as provided in subsection (c), if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to § 4-4-403 or (ii) the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

(b) Except as provided in subsection (c), if an instrument has been paid or accepted by mistake and the case is not covered by subsection (a), the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, (i) recover the payment from the person to whom or for whose benefit payment was made or (ii) in the case of acceptance, may revoke the acceptance.

(c) The remedies provided by subsection (a) or (b) may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by § 4-3-417 or § 4-4-407.

(d) Notwithstanding § 4-4-215, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (a) or (b), the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

History. Acts 1991, No. 572, § 5.

4-3-419. Instruments signed for accommodation.

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct

beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d), is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in § 4-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied, (ii) the other party is insolvent or in an insolvency proceeding, (iii) the other party cannot be served with process, or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

(e) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

History. Acts 1991, No. 572, § 5.

CASE NOTES

ANALYSIS

Accommodation party.

Defenses.

Instrument taken for value before due.

Knowledge of other party.

Purpose of signature.

Release from liability.

Accommodation Party.

Whether party was an accommodation signer is an issue of fact. *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d

194 (1987) (decision under prior law).

The intention of the parties is the most significant element in determining accommodation status, and where a person receives no direct benefit from an executed note, it is likely that he will be regarded as the accommodation party. *Mobley v. Harmon*, 304 Ark. 500, 803 S.W.2d 900 (1991) (decision under prior law).

Defenses.

Where before the surety has under-

taken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond what the creditor has reason to believe the surety intends to assume, and the creditor also believes that these facts are unknown to the surety, and had reasonable opportunity to communicate them to the surety, creditor's failure to notify the surety of such facts is a defense to the surety. *Camp v. First Fin. Fed. Sav. & Loan Ass'n*, 299 Ark. 455, 772 S.W.2d 602 (1989) (decision under prior law).

Where the bank assigned the note to the accommodator, he became holder of the note, and though ordinarily a holder takes a note assignment subject to all defenses which the maker had against the bank, an accommodation maker has an independent cause of action against the party accommodated; consequently, maker's right of recourse was unencumbered by any defenses the accommodated party held against the bank. *Mobley v. Harmon*, 304 Ark. 500, 803 S.W.2d 900 (1991) (decision under prior law).

Instrument Taken for Value Before Due.

Although maker of note to secure payments on automobile alleged that he was an accommodation party, having signed to accommodate his mother, he was liable in any case, since when an instrument is taken for value before it is due, accommodation party is liable in the capacity in which he signed. *Wheless v. Eudora Bank*, 256 Ark. 644, 509 S.W.2d 532 (1974) (decision under prior law).

Knowledge of Other Party.

It is no defense to an action on a note by an assignee thereof that the defendant was an accommodation endorser and that the assignee knew of that fact at the time of its purchase of the note. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968) (decision under prior law).

Knowledge of the other party that defendant was an accommodation endorser did not relieve defendant of liability. *National Surety Corp. v. Crystal Springs Fishing Village, Inc.*, 326 F. Supp. 1171 (W.D. Ark 1971) (decision under prior law).

Purpose of Signature.

A wife who, with her husband, signed a note to obtain money to build a home which they owned as tenants by the entirety received benefits from the note and, therefore, could not be an accommodation signer. *Riegler v. Riegler*, 244 Ark. 483, 426 S.W.2d 789 (1968) (decision under prior law).

Nonshareholders of corporation which received money who signed the note on the back only when asked to do so by the bank were accommodation endorsers with right of recourse to recover, from the shareholders who executed the note, any payment made by them, even though they had a contract from the corporation to obtain financing for the project involved. *Hanson v. Cheek*, 251 Ark. 897, 475 S.W.2d 526 (1972) (decision under prior law).

Where the plaintiff's purpose in signing a mortgage note as security for a loan obtained by his corporation was not solely to lend his name as a surety to the other comakers, but was primarily to benefit his business interests, the plaintiff was not an accommodation endorser, and therefore, he was not entitled to foreclose the mortgage lien on the defendant's property. *Nelson v. Cotham*, 268 Ark. 622, 595 S.W.2d 693 (1980) (decision under prior law).

Release from Liability.

As to whether a guarantor is released from an obligation, unless the guarantor is notified and consents to material changes, the test is whether there was a "material alteration" of the agreement, so as to discharge the guarantor. *Worthen Bank & Trust Co. v. Utley*, 748 F.2d 1269 (8th Cir. 1984) (decision under prior law).

Where guarantor was liable to bank on three promissory notes, the actual terms of which were never materially altered, and it was clear from the evidence that nothing was done in this regard without guarantor's knowledge or consent; guarantor was not released from personal liability on notes. *Worthen Bank & Trust Co. v. Utley*, 748 F.2d 1269 (8th Cir. 1984) (decision under prior law).

4-3-420. Conversion of instrument.

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Liabilities for Forged Indorsements, 35 Ark. L. Rev. 157.

CASE NOTES

ANALYSIS

Damages.

Forged endorsements.

Joint instrument.

Reasonable commercial standards.

Damages.

The drawee bank was not liable to the drawer for honoring checks on which payees' endorsements had been forged, where the money actually reached the parties intended by the drawer of the check. *Starkey Constr., Inc. v. Elcon, Inc.*, 248 Ark. 958, 457 S.W.2d 509 (1970) (decision under prior law).

Forged Endorsements.

There is a common law exception to this section, when the proceeds of the forged instrument are paid to the person whom the drawer intended to receive them and, consequently, where a husband forged his wife's signature on an insurance check that was payable to her and presented the check to their bank, the bank was not

liable to the wife for having honored the check because the proceeds from the check were deposited in an account on which the wife was a co-signor, the money was available to her at all times and the money reached her although not in the manner she expected. *Clemens v. First Nat'l Bank*, 286 Ark. 290, 692 S.W.2d 222 (1985) (decision under prior law).

Joint Instrument.

Where check was given to one joint payee by the other joint payee, no conversion occurred, even though second payee refused to give any funds to the first payee. *A.C.E., Inc. v. Inland Mtg. Co.*, 333 Ark. 232, 969 S.W.2d 176 (1998).

Reasonable Commercial Standards.

The question of the corporation's negligence in permitting the embezzling bookkeeper's forgeries to go undiscovered was irrelevant until the bank established it acted according to reasonable commercial standards. *First Bank & Trust v. Vaccari*,

288 Ark. 233, 703 S.W.2d 867 (1986) (decision under prior law).

The burden of proof is on the bank to show it acted in a commercially reasonable manner. *First Bank & Trust v. Vaccari*, 288 Ark. 233, 703 S.W.2d 867 (1986) (decision under prior law).

It was a jury question whether it was commercially unreasonable for a bank to accept for deposit in an individual account a check made payable to a corporation without first ascertaining, or at least mak-

ing an inquiry, as to the authority of the depositor/endorser. *First Bank & Trust v. Vaccari*, 288 Ark. 233, 703 S.W.2d 867 (1986) (decision under prior law).

Bank's practice of paying cash to corporation's bookkeeper when she deposited company checks marked "For Deposit Only" was not commercially reasonable. *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992).

PART 5 — DISHONOR

SECTION.

4-3-501. Presentment.

4-3-502. Dishonor.

4-3-503. Notice of dishonor.

SECTION.

4-3-504. Excused presentment and notice of dishonor.

4-3-505. Evidence of dishonor.

4-3-501. Presentment.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to chapter 4 of this subtitle, agreement of the parties, and clearing-house rules and the like:

(1) presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one (1) of two (2) or more makers, acceptors, drawees, or other payors.

(2) upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) the party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2:00 p.m. for the receipt and processing of instruments

presented for payment or acceptance and presentment is made after the cut-off hour.

History. Acts 1991, No. 572, § 5.

4-3-502. Dishonor.

(a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and paragraph (2) does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under § 4-4-301 or § 4-4-302, or becomes accountable for the amount of the check under § 4-4-302.

(2) If a draft is payable on demand and paragraph (1) does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if (i) presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or (ii) presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in subsections (b)(2), (3), and (4), except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under § 4-3-504, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

History. Acts 1991, No. 572, § 5.

4-3-503. Notice of dishonor.

(a) The obligation of an indorser stated in § 4-3-415(a) and the obligation of a drawer stated in § 4-3-414(d) may not be enforced unless (i) the indorser or drawer is given notice of dishonor of the instrument complying with this section or (ii) notice of dishonor is excused under § 4-3-504(b).

(b) Notice of dishonor may be given by any person; may be given by any commercially reasonable means, including an oral, written, or electronic communication; and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument given to a bank for collection is sufficient notice of dishonor.

(c) Subject to § 4-3-504(c), with respect to an instrument taken for collection by a collecting bank, notice of dishonor must be given (i) by the bank before midnight of the next banking day following the banking day on which the bank receives notice of dishonor of the instrument, or (ii) by any other person within thirty (30) days following the day on which the person receives notice of dishonor. With respect to any other instrument, notice of dishonor must be given within thirty (30) days following the day on which dishonor occurs.

History. Acts 1991, No. 572, § 5.

4-3-504. Excused presentment and notice of dishonor.

(a) Presentment for payment or acceptance of an instrument is excused if (i) the person entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the maker or acceptor has repudiated an obligation to pay the instrument or is dead or in insolvency proceedings, (iii) by the terms of the instrument presentment is not necessary to enforce the obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or accepted, or (v) the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

(b) Notice of dishonor is excused if (i) by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to

pay the instrument, or (ii) the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.

(c) Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate.

History. Acts 1991, No. 572, § 5.

CASE NOTES

Stale Checks.

When presentment is delayed beyond the time when it is due, the drawer of an instrument is discharged only if the conditions provided for in this section are present; therefore, a check pledged as security and held for 17 months did not lose its negotiability by the mere passage of time. *Wildman Stores, Inc. v. Carlisle Distrib. Co.*, 15 Ark. App. 11, 688 S.W.2d 748 (1985) (decision under prior law).

This section should not be read in conjunction with § 4-3-601, generally providing for a drawer's discharge from liability, so as to discharge the drawer of a check merely because it was stale; therefore, a check pledged as security and held for 17 months did not lose its negotiability by the mere passage of time. *Wildman Stores, Inc. v. Carlisle Distrib. Co.*, 15 Ark. App. 11, 688 S.W.2d 748 (1985) (decision under prior law).

4-3-505. Evidence of dishonor.

(a) The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated:

(1) A document regular in form as provided in subsection (b) which purports to be a protest;

(2) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor;

(3) A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business which shows dishonor, even if there is no evidence of who made the entry.

(b) A protest is a certificate of dishonor made by a United States consul or vice consul, or a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made upon information satisfactory to that person. The protest must identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties.

History. Acts 1991, No. 572, § 5.

PART 6 — DISCHARGE AND PAYMENT

SECTION.

4-3-601. Discharge and effect of discharge.

4-3-602. Payment.

4-3-603. Tender of payment.

SECTION.

4-3-604. Discharge by cancellation or renunciation.

4-3-605. Discharge of indorsers and accommodation parties.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

UALR L.J. Jenkins, Arkansas's Revised Article 3: User Caution Advised!!, 16 **UALR L.J.** 573.

4-3-601. Discharge and effect of discharge.

(a) The obligation of a party to pay the instrument is discharged as stated in this chapter or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.

(b) Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge.

History. Acts 1991, No. 572, § 5.

CASE NOTES**ANALYSIS**

Assignment.
Stale checks.

Assignment.

The act of the assignee in marking a note "paid" upon payment by the assignor did not discharge the maker of the note, and the assignor could enforce the obligation against the maker. *K. & S. Int'l, Inc. v. Howard*, 249 Ark. 901, 462 S.W.2d 458 (1971) (decision under prior law).

Stale Checks.

Section 4-3-504 which prescribes the time limit for staleness should not be read in conjunction with this section, so as to discharge the drawer of a check merely because it was stale; therefore, a check pledged as security and held for 17 months did not lose its negotiability by the mere passage of time. *Wildman Stores, Inc. v. Carlisle Distrib. Co.*, 15 Ark. App. 11, 688 S.W.2d 748 (1985) (decision under prior law).

4-3-602. Payment.

(a) Subject to subsection (b), an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument. To

the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under § 4-3-306 by another person.

(b) The obligation of a party to pay the instrument is not discharged under subsection (a) if:

(1) a claim to the instrument under § 4-3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) the person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

History. Acts 1991, No. 572, § 5.

Cross References. Payment due on holiday, § 1-5-105.

RESEARCH REFERENCES

UALR L.J. Murphey, The Discontinuance of the Certified Check — An Arkansas Study, 16 UALR L.J. 555.

CASE NOTES

ANALYSIS

Assignment.

Rights of transferees.

Satisfaction to the holder.

Stale checks.

Assignment.

The act of the assignee in marking a note "paid" upon payment by the assignor did not discharge the maker of the note, and the assignor could enforce the obligation against the maker. *K. & S. Int'l, Inc. v. Howard*, 249 Ark. 901, 462 S.W.2d 458 (1971) (decision under prior law).

Rights of Transferees.

Mother became transferee and possessed all the rights of the lender including right to foreclose on the mortgage when she paid a debt owed by her son and his wife which was secured by a mortgage on their property and thereafter received from the lender's wife the unendorsed

note and the mortgage. *Griffith v. Griffith*, 250 Ark. 845, 467 S.W.2d 737 (1971) (decision under prior law).

Satisfaction to the Holder.

Maker of bad checks held not liable to bank for the amount of the bad checks where satisfaction was made to the holder of checks. *Chenoweth v. Bank of Dardanelle*, 243 Ark. 310, 419 S.W.2d 792 (1967) (decision under prior law).

Stale Checks.

Section 4-3-504 which prescribes the time limit for staleness should not be read in conjunction with this section, so as to discharge the drawer of a check merely because it was stale; therefore, a check pledged as security and held for 17 months did not lose its negotiability by the mere passage of time. *Wildman Stores, Inc. v. Carlisle Distrib. Co.*, 15 Ark. App. 11, 688 S.W.2d 748 (1985) (decision under prior law).

4-3-603. Tender of payment.

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

History. Acts 1991, No. 572, § 5.

Cross References. Payment due on holiday, § 1-5-105.

CASE NOTES**Subsequent Liability.**

Tender of amount due on note secured by a mortgage, which was wrongfully refused, discharged mortgagor from further

interest accrual and attorneys' fees. First State Bank v. Gamble, 14 Ark. App. 53, 685 S.W.2d 173 (1985) (decision under prior law).

4-3-604. Discharge by cancellation or renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) does not affect the status and rights of a party derived from the indorsement.

History. Acts 1991, No. 572, § 5.

4-3-605. Discharge of indorsers and accommodation parties.

(a) In this section, the term "indorser" includes a drawer having the obligation described in § 4-3-414(d).

(b) Discharge, under § 4-3-604, of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to an extension of the due date of the obligation of a party to pay the instrument, the extension discharges an indorser or accommodation party having a right of recourse against the party whose obligation is extended to the extent the indorser or accommodation party proves that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.

(d) If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an indorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the indorser or accommodation party with respect to the right of recourse. The loss suffered by the indorser or accommodation party as a result of the modification is equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was an amount less than the amount of the right of recourse.

(e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.

(f) If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection (e), the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge.

(g) Under subsection (e) or (f), impairing value of an interest in collateral includes (i) failure to obtain or maintain perfection or recordation of the interest in collateral, (ii) release of collateral without

substitution of collateral of equal value, (iii) failure to perform a duty to preserve the value of collateral owed, under chapter 9 of this subtitle or other law, to a debtor or surety or other person secondarily liable, or (iv) failure to comply with applicable law in disposing of collateral.

(h) An accommodation party is not discharged under subsections (c), (d), or (e) unless the person entitled to enforce the instrument knows of the accommodation or has notice under § 4-3-419(c) that the instrument was signed for accommodation.

(i) A party is not discharged under this section if: (i) The party asserting discharge consents to the event or conduct that is the basis of the discharge; or (ii) The instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.

History. Acts 1991, No. 572, § 5.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 14
UALR L.J. 735.

CASE NOTES

ANALYSIS

Agreements not to sue.
Any party to the instrument.
Extensions.
Impairment of collateral.
Knowledge of recourse.
Release of guarantors.
Unauthorized extensions.

Agreements Not to Sue.

The provision of this section that an agreement not to sue any person against whom the party has a right of recourse discharges a party to the instrument does not apply where the evidence does not show that an enforceable or binding agreement not to sue was made. *Glover v. Nat'l Bank of Commerce*, 258 Ark. 771, 529 S.W.2d 333 (1975) (decision under prior law).

This section applies where there is an enforceable contract not to sue a liable party. *Ward v. Worthen Bank & Trust Co.*, 284 Ark. 355, 681 S.W.2d 365 (1984) (decision under prior law).

Where a bank did not make an enforceable contract not to sue the purchaser of a note, the original maker of the note was not discharged from liability on the note during the time the bank suspended col-

lection efforts. *Ward v. Worthen Bank & Trust Co.*, 284 Ark. 355, 681 S.W.2d 365 (1984) (decision under prior law).

Any Party to the Instrument.

The term "any party to the instrument" includes makers and endorsers. *Farmers & Merchants Bank v. Poe*, 19 Ark. App. 151, 718 S.W.2d 457 (1986) (decision under prior law).

The defenses under this section are available to both makers and accommodation parties. *Sanders v. Stephens Sec. Bank*, 75 Bankr. 746 (Bankr. W.D. Ark. 1987); *Sanders v. First Nat'l Bank*, 75 Bankr. 751 (Bankr. W.D. Ark. 1987); *Sanders v. Merchants & Planters Bank*, 75 Bankr. 757 (Bankr. W.D. Ark. 1987); *Sanders v. Merchants & Planters Bank*, 75 Bankr. 761 (Bankr. W.D. Ark. 1987) (decision under prior law).

This section only applies to "any party to the instrument," and does not encompass a person who has signed a separate guaranty agreement. *Myers v. First State Bank*, 293 Ark. 82, 732 S.W.2d 459, supp. op., 293 Ark. 87A, 741 S.W.2d 624 (1987) (decision under prior law).

The words "agrees to suspend the right to enforce" signify the granting of an extension of time for payment. Hence, the

holder of a note discharges any party to the instrument, including accommodation makers, to the extent that the holder grants an extension without the consent of the party or without an express reservation of rights. *McIlroy Bank & Trust v. Maestri*, 297 Ark. 130, 759 S.W.2d 808 (1988) (decision under prior law).

Where the bank assigned the note to the accommodator, he became holder of the note, and though ordinarily a holder takes a note assignment subject to all defenses which the maker had against the bank, an accommodation maker has an independent cause of action against the party accommodated; consequently, maker's right of recourse was unencumbered by any defenses the accommodated party held against the bank. *Mobley v. Harmon*, 304 Ark. 500, 803 S.W.2d 900 (1991) (decision under prior law).

Although the primary maker was automatically discharged against the bank when the note was extended without his consent, such discharge was not a defense available against an accommodation party suing the accommodated primary maker. *Mobley v. Harmon*, 304 Ark. 500, 803 S.W.2d 900 (1991) (decision under prior law).

Extensions.

Where a bank chose to extend a loan obligation four times with only the accommodation maker's agreement, it effectively released the primary maker. *Mobley v. Harmon*, 304 Ark. 500, 803 S.W.2d 900 (1991) (decision under prior law).

Impairment of Collateral.

It is no defense for one claiming to be an accommodation endorser of a note that the holder of the note impaired the collateral by failure to complete the proper filing of the financing statement, where the endorser could have seen to the filing himself. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968) (decision under prior law).

Refusal of bank to accept certain collateral on reduction of its indebtedness did not constitute an impairment of collateral. *Worthen Bank & Trust Co. v. Utley*, 748 F.2d 1269 (8th Cir. 1984) (decision under prior law).

Where guarantor of loans failed to prove that bank, holder of the note, was responsible for the loss or impairment of the collateral and the extent to which that impairment resulted in loss, court correctly found no impairment of collateral on the part of the bank and was justified in refusing to so instruct the jury. *Worthen Bank & Trust Co. v. Utley*, 748 F.2d 1269 (8th Cir. 1984) (decision under prior law).

Where the collateral was impaired because of the creditor's failure to properly file its security agreement with the Secretary of State so as to perfect its security interest in the inventory, the creditor discharged the guarantor, and the creditor could not reserve its rights to personally sue the guarantor for the deficiency on the note by virtue of the settlement agreement. *Farmers & Merchants Bank v. Poe*, 19 Ark. App. 151, 718 S.W.2d 457 (1986) (decision under prior law).

Creditor who is not in possession of collateral has no obligation to repossess it for protection of its guarantor, and failure to do so is not impairment of collateral. *Moore v. Luxor (N. Am.) Corp.*, 294 Ark. 326, 742 S.W.2d 916 (1988) (decision under prior law).

Impairment of recourse or collateral is not available to the maker of a note as a defense to a foreclosure action. *Federal Land Bank v. McGinnis*, 711 F. Supp. 952 (E.D. Ark. 1989) (decision under prior law).

Knowledge of Recourse.

This section is made to appear to be effective against a holder who releases an obligor with knowledge of recourse the holder may have against the obligor; the section contemplates knowledge of recourse the party may have had against the person discharged or released. *Shinn v. First Nat'l Bank*, 270 Ark. 774, 606 S.W.2d 154 (1980) (decision under prior law).

Release of Guarantors.

One of several guarantors on a note, each of which guaranteed a specific portion of the note and agreed to be liable notwithstanding the release of any other guarantor, was not released by failure of the holder to file a claim against the estate of a deceased guarantor within the statu-

tory period for filing claims, which expired before the default of the maker on the note. *Rauch v. First Nat'l Bank*, 244 Ark. 941, 428 S.W.2d 89 (1968) (decision under prior law). (But see, *Myers v. First State Bank of Sherwood*, 293 Ark. 82, 732 S.W.2d 459, modified, 293 Ark. 87A, 741 S.W.2d 624 (1987).)

A guarantor who pleads release has the burden of proving that release and, under this section, that burden requires that he prove that the collateral was impaired, and the extent to which the collateral was impaired. *Van Balen v. Peoples Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981) (decision under prior law). (But see, *Myers v. First State Bank of Sherwood*, 293 Ark. 82, 732 S.W.2d 459, modified, 293 Ark. 87A, 741 S.W.2d 624 (1987).)

The discharge of guaranty involves proof that (1) the holder of the note was responsible for the loss or impairment of the collateral, and (2) the extent to which that impairment results in loss; mere proof that the holder did not properly perfect its lien on a part of the collateral does not in and of itself show that any damage resulted. *Van Balen v. Peoples Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981) (decision under prior law). (But see, *Myers v. First State Bank*, 293 Ark. 82, 732 S.W.2d 459, modified, 293 Ark. 87A, 741 S.W.2d 624 (1987).)

Where there was no evidence in the record of the value of the collateral initially pledged, the guarantors of the debt could not meet the burden of proving the extent of the impairment of the collateral and their right to pro tanto release. *Van Balen v. Peoples Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981) (decision under prior law).

A material alteration in the obligation assumed, made without the assent of the guarantor, discharges him. *Merchants Nat'l Bank v. Blass*, 282 Ark. 497, 669 S.W.2d 195 (1984) (decision under prior law). (But see, *Myers v. State*, 293 Ark. 82, 732 S.W.2d 459, modified, 293 Ark. 87A, 741 S.W.2d 624 (1987).)

If the due date of a note is extended without the consent of a party eligible to rely on this section, that party is discharged from liability to the holder of the note. *Sanders v. Stephens Sec. Bank*, 75 Bankr. 746 (Bankr. W.D. Ark. 1987); *Sand-*

ers v. First Nat'l Bank, 75 Bankr. 751 (Bankr. W.D. Ark. 1987); *Sanders v. Merchants & Planters Bank*, 75 Bankr. 757 (Bankr. W.D. Ark. 1987) (preceding decisions under prior law). (But see, *Myers v. First State Bank*, 293 Ark. 82, 732 S.W.2d 459, modified, 293 Ark. 87A, 741 S.W.2d 624 (1987).)

When a material alteration in an obligation is made without the consent of the uncompensated guarantor, the guarantor is discharged from liability. An increase in the interest rate of the principal debt without the consent of the uncompensated guarantor increases the guarantor's obligation and therefore discharges the guarantor. *Sanders v. Merchants & Planters Bank*, 75 Bankr. 761 (Bankr. W.D. Ark. 1987) (decision under prior law). (But see, *Myers v. First State Bank*, 293 Ark. 82, 732 S.W.2d 459, modified, 293 Ark. 87A, 741 S.W.2d 624 (1987).)

Comaker's liability on note had to be found in note itself, and not accompanying mortgage, and where the due date of the note was extended without the comaker's consent, and the extension was not provided for in the note, that party was discharged from liability even though the comaker had signed the mortgage which provided that "This conveyance is given as a Mortgage for the purpose of securing: (a) The payment of 1 Promissory Note(s) of even date herewith and all extensions and renewals of the indebtedness." *Sanders v. Merchants & Planters Bank*, 75 Bankr. 761 (Bankr. W.D. Ark. 1987) (decision under prior law). (But see, *Myers v. First State Bank*, 293 Ark. 82, 732 S.W.2d 459, modified, 293 Ark. 87A, 741 S.W.2d 624 (1987).)

Unauthorized Extensions.

An accommodation maker of a promissory note is discharged from liability on the note when the payee extends the time for payment four times, twice with the agreement of the accommodation maker and twice without such agreement, and each extension is for a time in excess of that prescribed for payment in the original note; the extensions which were not authorized by the accommodation maker discharged him from liability. *Rogers v. Merchants & Planters Bank*, 302 Ark. 353, 789 S.W.2d 463 (1990) (decision under prior law).

CHAPTER 4

BANK DEPOSITS AND COLLECTIONS

PART.

1. GENERAL PROVISIONS AND DEFINITIONS.
2. COLLECTION OF ITEMS — DEPOSITARY AND COLLECTING BANKS.
3. COLLECTION OF ITEMS — PAYOR BANKS.
4. RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.
5. COLLECTION OF DOCUMENTARY DRAFTS.

RESEARCH REFERENCES

ALR. Documentary draft under UCC § 4-104(1)(f). 65 ALR 4th 1095.

Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 ALR 4th 778.

What constitutes wrongful dishonor of check rendering payor bank liable to drawer under UCC § 4-402. 88 ALR 4th 568.

Who may recover for wrongful dishonor of check under UCC § 4-402. 88 ALR 4th 613.

Damages recoverable for wrongful dishonor of check under UCC § 4-402. 88 ALR 4th 644.

Am. Jur. 10 Am. Jur. 2d, Banks, § 705 et seq. and 11 Am. Jur. 2d, Banks, § 970 et seq.

Ark. L. Rev. Bank Deposits and Collections: Article IV — Letters of Credit: Article V, 16 Ark. L. Rev. 45.

Bank to Bank Relations under the Uniform Commercial Code: Article IV, 16 Ark. L. Rev. 61.

Bank to Consumer Relations under the Uniform Commercial Code: Article IV, 16 Ark. L. Rev. 66.

Electronic Funds Transfer and "Competitive Equality": A Doctrine That Does Not Compute, 32 Ark. L. Rev. 347.

The Uniform Commercial Code and the Arkansas Electronic Funds Transfer System, Hargis, 32 Ark. L. Rev. 470.

Murphey, Revised Article 3 and Amended Article 4 of the Uniform Commercial Code: Comments on the Changes They Will Make, 46 Ark. L. Rev. 501.

UALR L.J. Murphey, Acceptance and Dishonor: "Payable Through" Drafts and Personal Money Orders, 5 UALR L.J. 519.

Verdun, Postdated checks: An old problem with a new solution in the revised U.C.C., 14 UALR L.J. 37.

Adams, Problems with the 1990 Revision of Articles 3 and 4 of the Uniform Commercial Code, 15 UALR L.J. 665.

CASE NOTES

Punitive Damages.

Punitive damages can be awarded for bad faith Article 4 violations, where the statute does not specifically prohibit them, without the necessity that an alternative, common law tort be pled. *Gordon v.*

Planters & Merchants Bankshares, Inc., 326 Ark. 1046, 935 S.W.2d 544 (1996).

Cited: *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. 1964).

PART 1 — GENERAL PROVISIONS AND DEFINITIONS

SECTION.

4-4-101. Short title.

SECTION.

4-4-102. Applicability.

SECTION.

- 4-4-103. Variation by agreement — Measure of damages — Action constituting ordinary care.
- 4-4-104. Definitions and index of definitions.
- 4-4-105. “Bank” — “Depository bank” — “Payor bank” — “Intermediary bank” — “Collecting bank” — “Presenting bank”.

SECTION.

- 4-4-106. Payable through or payable at bank — Collecting bank.
- 4-4-107. Separate office of a bank.
- 4-4-108. Time of receipt of items.
- 4-4-109. Delays.
- 4-4-110. Electronic presentment.
- 4-4-111. Statute of limitations.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. Documentary draft under UCC § 4-104(1)(f). 65 ALR 4th 1095.

UALR L.J. Survey—Business Law, 14 UALR L.J. 735.

4-4-101. Short title.

This chapter may be cited as Uniform Commercial Code — Bank Deposits and Collections.

History. Acts 1961, No. 185, § 4-101; reen. 1967, No. 303, § 12 (4-101); A.S.A. 1947, § 85-4-101; Acts 1991, No. 572, § 6.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

4-4-102. Applicability.

(a) To the extent that items within this chapter are also within chapters 3 and 8 of this subtitle, they are subject to those chapters. If there is conflict, this chapter governs chapter 3, but chapter 8 governs this chapter.

(b) The liability of a bank for action or non-action with respect to an item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

History. Acts 1961, No. 185, § 4-102; reen. 1967, No. 303, § 12 (4-102); A.S.A. 1947, § 85-4-102; Acts 1991, No. 572, § 6.

4-4-103. Variation by agreement — Measure of damages — Action constituting ordinary care.

(a) The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal Reserve regulations and operating circulars, clearinghouse rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled.

(c) Action or non-action approved by this chapter or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or non-action consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this chapter, is *prima facie* the exercise of ordinary care.

(d) The specification or approval of certain procedures by this chapter is not disapproval of other procedures that may be reasonable under the circumstances.

(e) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there is also bad faith, it includes any other damages the party suffered as a proximate consequence.

History. Acts 1961, No. 185, § 4-103; reen. 1967, No. 303, § 12 (4-103); A.S.A. 1947, § 85-4-103; Acts 1991, No. 572, § 6.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Gordon v. Bank's Wrongful Charge-Back, 51 Ark. L. Rev. 611.
Planters & Merchants Bancshares: Punitive Damages May Be Awarded For

CASE NOTES

Measure of Damages.

In a suit by a payee against a bank for negligence in failing to timely notify the payee that the checks had been dishonored, the amount of damages was limited, absent a showing of bad faith, by the amount of the dishonored items reduced

by the amount which would not have been recovered even if the bank had exercised ordinary care. *Citizens Bank v. Chitty*, 285 Ark. 55, 684 S.W.2d 814 (1985).

Cited: *Gordon v. Planters & Merchants Bankshares, Inc.*, 326 Ark. 1046, 935 S.W.2d 544 (1996).

4-4-104. Definitions and index of definitions.

(a) In this chapter, unless the context otherwise requires:

(1) "Account" means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit;

(2) "Afternoon" means the period of a day between noon and midnight;

(3) "Banking day" means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions;

(4) "Clearinghouse" means an association of banks or other payors regularly clearing items;

(5) "Customer" means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;

(6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (§ 4-8-102) or instructions for uncertificated securities (§ 4-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft;

(7) "Draft" means a draft as defined in § 4-3-104 or an item, other than an instrument, that is an order;

(8) "Drawee" means a person ordered in a draft to make payment;

(9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by chapter 4A of this subtitle or a credit or debit card slip;

(10) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;

(11) "Settle" means to pay in cash, by clearinghouse settlement, in a charge or credit or by remittance, or otherwise as agreed. A settlement may be either provisional or final;

(12) "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this chapter and the sections in which they appear are:

"Agreement for electronic presentment". Section 4-4-110.

"Bank". Section 4-4-105.

"Collecting bank". Section 4-4-105.

"Depository bank". Section 4-4-105.

"Intermediary bank". Section 4-4-105.

"Payor bank". Section 4-4-105.

"Presenting bank". Section 4-4-105.

"Presentment notice". Section 4-4-110.

(c) The following definitions in other chapters of this subtitle apply to this chapter:

- "Acceptance". Section 4-3-409.
- "Alteration". Section 4-3-407.
- "Cashier's check". Section 4-3-104.
- "Certificate of deposit". Section 4-3-104.
- "Certified check". Section 4-3-409.
- "Check". Section 4-3-104.
- "Good faith". Section 4-3-103.
- "Holder in due course". Section 4-3-302.
- "Instrument". Section 4-3-104.
- "Notice of dishonor". Section 4-3-503.
- "Order". Section 4-3-103.
- "Ordinary care". Section 4-3-103.
- "Person entitled to enforce". Section 4-3-301.
- "Presentment". Section 4-3-501.
- "Promise". Section 4-3-103.
- "Prove". Section 4-3-103.
- "Teller's check". Section 4-3-104.
- "Unauthorized signature". Section 4-3-403.

(d) In addition, chapter 1 of this subtitle contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History. Acts 1961, No. 185, § 4-104; 1947, § 85-4-104; Acts 1991, No. 572, § 6; reen. 1967, No. 303, § 12 (4-104); A.S.A. 1995, No. 425, § 4.

CASE NOTES

ANALYSIS

Customers.
Documentary drafts.

Customers.

Where the president of a corporate lessor and the lessee opened an account with the provision that checks on the account required signatures of both the president and his son-in-law who was the lessee, the president was a customer of the bank. *First Nat'l Bank v. Hobbs*, 248 Ark. 76, 450 S.W.2d 298 (1970).

Documentary Drafts.

The drafts, which were written on the backs of envelopes and which were represented as containing car titles to be delivered against honor of the drafts, were documentary drafts. *First State Bank v. Twin City Bank*, 290 Ark. 399, 720 S.W.2d 295 (1986).

Cited: *Citizens Bank v. Chitty*, 285 Ark. 55, 684 S.W.2d 814 (1985).

4-4-105. "Bank" — "Depository bank" — "Payor bank" — "Intermediary bank" — "Collecting bank" — "Presenting bank".

In this chapter:

(1) "Bank" means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company;

(2) "Depository bank" means the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter;

(3) "Payor bank" means a bank that is the drawee of a draft;

(4) "Intermediary bank" means a bank to which an item is transferred in course of collection except the depository or payor bank;

(5) "Collecting bank" means a bank handling an item for collection except the payor bank;

(6) "Presenting bank" means a bank presenting an item except a payor bank.

History. Acts 1961, No. 185, § 4-105; 1967, No. 303, § 12 (4-105); A.S.A. 1947, § 85-4-105; Acts 1991, No. 572, § 6.

4-4-106. Payable through or payable at bank — Collecting bank.

(a) If an item states that it is "payable through" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(b) If an item states that it is "payable at" a bank identified in the item, (i) the item designates the bank as a collecting bank and does not by itself authorize the bank to pay the item, and (ii) the item may be presented for payment only by or through the bank.

(c) If a draft names a nonbank drawee and it is unclear whether a bank named in the draft is a co-drawee or a collecting bank, the bank is a collecting bank.

History. Acts 1991, No. 572, § 6.

A.C.R.C. Notes. Former § 4-4-106 has been renumbered as § 4-4-107.

4-4-107. Separate office of a bank.

A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notice or orders must be given under this chapter and under chapter 3 of this subtitle.

History. Acts 1961, No. 185, § 4-106; 1967, No. 303, § 12 (4-106); A.S.A. 1947, § 85-4-106; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-106. Former § 4-4-107 has been renumbered as § 4-4-108.

4-4-108. Time of receipt of items.

(a) For the purpose of allowing time to process items, prove balances, and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2:00 p.m. or later as a cutoff hour for the handling of money and items and the making of entries on its books.

(b) An item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

History. Acts 1961, No. 185, § 4-107; reen. 1967, No. 303, § 12 (4-107); A.S.A. 1947, § 85-4-107; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-107. Former § 4-4-108 has been renumbered as § 4-4-109.

4-4-109. Delays.

(a) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment of a specific item drawn on a payor other than a bank, and with or without the approval of any person involved, may waive, modify, or extend time limits imposed or permitted by this subtitle for a period not exceeding two (2) additional banking days without discharge of drawers or indorsers or liability to its transferor or a prior party.

(b) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this subtitle or by instructions is excused if (i) the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank, and (ii) the bank exercises such diligence as the circumstances require.

History. Acts 1961, No. 185, § 4-108; reen. 1967, No. 303, § 12 (4-108); A.S.A. 1947, § 85-4-108; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-108. Former § 4-4-109 concerning the process of posting

was deleted by the amendment of this chapter by Acts 1991, No. 572, § 6. Former § 4-4-109 was derived from Acts 1961, No. 185, § 4-109, as added by Acts 1967, No. 303, § 12 (4-109); A.S.A. 1947, § 85-4-109.

CASE NOTES

Cited: First State Bank v. Twin City Bank, 290 Ark. 399, 720 S.W.2d 295 (1986).

4-4-110. Electronic presentment.

(a) "Agreement for electronic presentment" means an agreement, clearinghouse rule, or Federal Reserve regulation or operating circular, providing that presentment of an item may be made by transmission of an image of an item or information describing the item ("presentment notice") rather than delivery of the item itself. The agreement may provide for procedures governing retention, presentment, payment, dishonor, and other matters concerning items subject to the agreement.

(b) Presentment of an item pursuant to an agreement for presentment is made when the presentment notice is received.

(c) If presentment is made by presentment notice, a reference to "item" or "check" in this chapter means the presentment notice unless the context otherwise indicates.

History. Acts 1991, No. 572, § 6.

4-4-111. Statute of limitations.

An action to enforce an obligation, duty, or right arising under this chapter must be commenced within three (3) years after the cause of action accrues.

History. Acts 1991, No. 572, § 6.

PART 2 — COLLECTION OF ITEMS — DEPOSITARY AND COLLECTING BANKS

SECTION.

- 4-4-201. Status of collecting bank as agent and provisional status of credits — Applicability of chapter — Item indorsed "Pay Any Bank".
- 4-4-202. Responsibility for collection or return — When action timely.
- 4-4-203. Effect of instructions.
- 4-4-204. Methods of sending and presenting — Sending directly to payor bank.
- 4-4-205. Depositary bank holder of undorsed item.
- 4-4-206. Transfer between banks.
- 4-4-207. Transfer warranties.
- 4-4-208. Presentment warranties.
- 4-4-209. Encoding and retention warranties.
- 4-4-210. Security interest of collecting bank in items, accompany-

SECTION.

- ing documents, and proceeds.
- 4-4-211. When bank gives value for purposes of holder in due course.
- 4-4-212. Presentment by notice of item not payable by, through, or at bank — Liability of drawer or indorser.
- 4-4-213. Medium and time of settlement by bank.
- 4-4-214. Right of charge-back or refund — Liability of collecting bank — Return of item.
- 4-4-215. Final payment of item by payor bank — When provisional debits and credits become final — When certain credits become available for withdrawal.
- 4-4-216. Insolvency and preference.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout

the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

ALR. Final payment under UCC § 4-213. 23 ALR 4th 203.

4-4-201. Status of collecting bank as agent and provisional status of credits — Applicability of chapter — Item indorsed “Pay Any Bank”.

(a) Unless a contrary intent clearly appears and before the time that a settlement given by a collecting bank for an item is or becomes final, the bank, with respect to the item, is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank, such as those resulting from outstanding advances on the item and rights of recoupment or setoff. If an item is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of this chapter apply even though action of the parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(b) After an item has been indorsed with the words “pay any bank” or the like, only a bank may acquire the rights of a holder until the item has been:

- (1) returned to the customer initiating collection; or
- (2) specially indorsed by a bank to a person who is not a bank.

History. Acts 1961, No. 185, § 4-201; A.S.A. 1947, § 85-4-201; Acts 1991, No. 572, § 6.

CASE NOTES**Holder in Due Course.**

Under the scheme of this chapter of the Uniform Commercial Code (subtitle 1 of this title), an Arkansas bank may be a holder in due course of forged check while acting as a collecting agent for its customer. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. 1964).

Where bank takes a negotiated instrument in satisfaction of an antecedent debt, the bank is a holder for value and in due course. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. 1964).

Cited: *Union Nat'l Bank v. Metropolitan Nat'l Bank*, 265 Ark. 340, 578 S.W.2d 220 (1979).

4-4-202. Responsibility for collection or return — When action timely.

- (a) A collecting bank must exercise ordinary care in:
- (1) presenting an item or sending it for presentment;

(2) sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that the item has not been paid or accepted, as the case may be;

(3) settling for an item when the bank receives final settlement; and

(4) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(b) A collecting bank exercises ordinary care under subsection (a) by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness.

(c) Subject to subsection (a)(1), a bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person or for loss or destruction of an item in the possession of others or in transit.

History. Acts 1961, No. 185, § 4-202; 1967, No. 303, § 13; A.S.A. 1947, § 85-4-202; Acts 1991, No. 572, § 6.

CASE NOTES

Notice of Dishonor.

A bank must use ordinary care in sending notice to the payee of dishonor of checks after learning that an item has not been paid or accepted and the burden is on

the bank to establish the reasonableness of notice provided beyond its midnight deadline. *Citizens Bank v. Chitty*, 285 Ark. 55, 684 S.W.2d 814 (1985).

4-4-203. Effect of instructions.

Subject to chapter 3 of this subtitle concerning conversion of instruments (§ 4-3-420) and restrictive indorsements (§ 4-3-206), only a collecting bank's transferor can give instructions that affect the bank or constitute notice to it, and a collecting bank is not liable to prior parties for any action taken pursuant to the instructions or in accordance with any agreement with its transferor.

History. Acts 1961, No. 185, § 4-203; A.S.A. 1947, § 85-4-203; Acts 1991, No. 572, § 6.

4-4-204. Methods of sending and presenting — Sending directly to payor bank.

(a) A collecting bank shall send items by a reasonably prompt method, taking into consideration relevant instructions, the nature of the item, the number of those items on hand, the cost of collection involved, and the method generally used by it or others to present those items.

(b) A collecting bank may send:

(1) an item directly to the payor bank;

(2) an item to a nonbank payor if authorized by its transferor; and

(3) an item other than documentary drafts to a nonbank payor, if authorized by Federal Reserve regulation or operating circular, clearinghouse rule, or the like.

(c) Presentment may be made by a presenting bank at a place where the payor bank or other payor has requested that presentment be made.

History. Acts 1961, No. 185, § 4-204; 1967, No. 303, § 14; A.S.A. 1947, § 85-4-204; Acts 1991, No. 572, § 6.

4-4-205. Depositary bank holder of unindorsed item.

If a customer delivers an item to a depositary bank for collection:

(1) the depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item, and, if the bank satisfies the other requirements of § 4-3-302, it is a holder in due course; and

(2) the depositary bank warrants to collecting banks, the payor bank or other payor, and the drawer that the amount of the item was paid to the customer or deposited to the customer's account.

History. Acts 1961, No. 185, § 4-205; A.S.A. 1947, § 85-4-205; Acts 1991, No. 572, § 6.

4-4-206. Transfer between banks.

Any agreed method that identifies the transferor bank is sufficient for the item's further transfer to another bank.

History. Acts 1961, No. 185, § 4-206; A.S.A. 1947, § 85-4-206; Acts 1991, No. 572, § 6.

4-4-207. Transfer warranties.

(a) A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:

- (1) the warrantor is a person entitled to enforce the item;
- (2) all signatures on the item are authentic and authorized;
- (3) the item has not been altered;
- (4) the item is not subject to a defense or claim in recoupment (§ 4-3-305(a)) of any party that can be asserted against the warrantor; and

(5) the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item

at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in §§ 4-3-115 and 4-3-407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor cannot disclaim its obligation under this subsection by an indorsement stating that it is made "without recourse" or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(e) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

History. Acts 1961, No. 185, § 4-207; § 6 divided the provision of § 4-4-207 into A.S.A. 1947, § 85-4-207; Acts 1991, No. present §§ 4-4-207 and 4-4-208 and re-wrote those provisions.

A.C.R.C. Notes. Acts 1991, No. 572,

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 14
UALR L.J. 735.

4-4-208. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

(1) the warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) the draft has not been altered; and

(3) the warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.

(b) A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the

breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft (i) breach of warranty is a defense to the obligation of the acceptor, and (ii) if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under § 4-3-404 or § 4-3-405 or the drawer is precluded under § 4-3-406 or § 4-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other item is presented for payment to a party obliged to pay the item, and the item is paid, the person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item, a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

History. Acts 1961, No. 185, § 4-207; § 6 divided the provisions of § 4-4-207 into present §§ 4-4-207 and 4-4-208 and A.S.A. 1947, § 85-4-207; Acts 1991, No. 572, § 6. rewrote those provisions. Former § 4-4-208 has been renumbered as § 4-4-210.

A.C.R.C. Notes. Acts 1991, No. 572, 208 has been renumbered as § 4-4-210.

4-4-209. Encoding and retention warranties.

(a) A person who encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depository bank encodes, that bank also makes the warranty.

(b) A person who undertakes to retain an item pursuant to an agreement for electronic presentment warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If a customer of a depository bank undertakes to retain an item, that bank also makes this warranty.

(c) A person to whom warranties are made under this section and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach.

History. Acts 1991, No. 572, § 6.

A.C.R.C. Notes. Former § 4-4-209 has been renumbered as § 4-4-211.

CASE NOTES

Parties Protected.

This section provides warranties to collecting banks and payors but not to a

payee. *France v. Ford Motor Credit Co.*, 323 Ark. 167, 913 S.W.2d 770 (1996).

4-4-210. Security interest of collecting bank in items, accompanying documents, and proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) in case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) if it makes an advance on or against the item.

(b) If credit given for several items received at one (1) time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to chapter 9, but:

(1) no security agreement is necessary to make the security interest enforceable (§ 4-9-203(b)(3)(A));

(2) no filing is required to perfect the security interest; and

(3) the security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

History. Acts 1961, No. 185, § 4-208; A.S.A. 1947, § 85-4-208; Acts 1991, No. 572, § 6; 2001, No. 1439, § 13.

A.C.R.C. Notes. This section was formerly codified as § 4-4-208. Former § 4-4-210 has been renumbered as § 4-4-212.

Amendments. The 2001 amendment deleted “of this subtitle” following “Chapter 9” in (c); substituted “§ 4-9-203(b)(3)(A)” for “§ 4-9-203(1)(a)” in (c)(1); and made minor stylistic changes throughout.

CASE NOTES

Cited: *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. 1964).

4-4-211. When bank gives value for purposes of holder in due course.

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of § 4-3-302 on what constitutes a holder in due course.

History. Acts 1961, No. 185, § 4-209; A.S.A. 1947, § 85-4-209; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-209. Former § 4-4-211 has been renumbered as § 4-4-213.

CASE NOTES

Cited: *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. 1964).

4-4-212. Presentment by notice of item not payable by, through, or at bank — Liability of drawer or indorser.

(a) Unless otherwise instructed, a collecting bank may present an item not payable by, through, or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under § 4-3-501 by the close of the bank's next banking day after it knows of the requirement.

(b) If presentment is made by notice and payment, acceptance, or request for compliance with a requirement under § 4-3-501 is not received by the close of business on the day after maturity or, in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any drawer or indorser by sending it notice of the facts.

History. Acts 1961, No. 185, § 4-210; A.S.A. 1947, § 85-4-210; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-210. Former § 4-4-212 has been renumbered as § 4-4-214.

CASE NOTES

Charge Back.

The right of the collecting bank to charge back terminates when a settle-

ment for the item becomes final. *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992).

There is a cause of action by the customer against a collecting bank when the collecting bank makes a charge-back for an item after it has received final settle-

ment. *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992).

4-4-213. Medium and time of settlement by bank.

(a) With respect to settlement by a bank, the medium and time of settlement may be prescribed by Federal Reserve regulations or circulars, clearinghouse rules, and the like, or agreement. In the absence of such prescription:

(1) the medium of settlement is cash or credit to an account in a Federal Reserve bank of or specified by the person to receive settlement; and

(2) the time of settlement, is:

(i) with respect to tender of settlement by cash, a cashier's check, or teller's check, when the cash or check is sent or delivered;

(ii) with respect to tender of settlement by credit in an account in a Federal Reserve bank, when the credit is made;

(iii) with respect to tender of settlement by a credit or debit to an account in a bank, when the credit or debit is made or, in the case of tender of settlement by authority to charge an account, when the authority is sent or delivered; or

(iv) with respect to tender of settlement by a funds transfer, when payment is made pursuant to § 4-4A-406(a) to the person receiving settlement.

(b) If the tender of settlement is not by a medium authorized by subsection (a) or the time of settlement is not fixed by subsection (a), no settlement occurs until the tender of settlement is accepted by the person receiving settlement.

(c) If settlement for an item is made by cashier's check or teller's check and the person receiving settlement, before its midnight deadline:

(1) presents or forwards the check for collection, settlement is final when the check is finally paid; or

(2) fails to present or forward the check for collection, settlement is final at the midnight deadline of the person receiving settlement.

(d) If settlement for an item is made by giving authority to charge the account of the bank giving settlement in the bank receiving settlement, settlement is final when the charge is made by the bank receiving settlement if there are funds available in the account for the amount of the item.

History. Acts 1961, No. 185, § 4-211; A.S.A. 1947, § 85-4-211; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-211. Former § 4-4-213 has been renumbered as § 4-4-215.

CASE NOTES

ANALYSIS

Cashier's check.
Charge back.

Cashier's Check.

Where an Arkansas bank presented to an Oklahoma bank a check drawn on Oklahoma bank, payable to debtor of Arkansas bank who had presented it in payment of an antecedent debt, and Oklahoma bank accepted the check and gave a cashier's check in exchange, payable to the Arkansas bank, the Arkansas bank was entitled to recover on the cashier's

check, although it had been dishonored by Oklahoma bank on discovery that the check drawn on it was forged. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. 1964).

Charge Back.

There is a cause of action by the customer against a collecting bank when the collecting bank makes a charge-back for an item after it has received final settlement. *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992).

4-4-214. Right of charge-back or refund — Liability of collecting bank — Return of item.

(a) If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account, or obtain refund from its customer, whether or not it is able to return the items, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final.

(b) A collecting bank returns an item when it is sent or delivered to the bank's customer or transferor or pursuant to its instructions.

(c) A depository bank that is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (§ 4-4-301).

(d) The right to charge back is not affected by:

- (1) previous use of a credit given for the item; or
- (2) failure by any bank to exercise ordinary care with respect to the item, but a bank so failing remains liable.

(e) A failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party.

(f) If credit is given in dollars as the equivalent of the value of an item payable in foreign money, the dollar amount of any charge-back or refund must be calculated on the basis of the bank-offered spot rate for the foreign money prevailing on the day when the person entitled to the

charge-back or refund learns that it will not receive payment in ordinary course.

History. Acts 1961, No. 185, § 4-212; 1967, No. 303, § 15; A.S.A. 1947, § 85-4-212; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-212. Former § 4-4-214 has been renumbered as § 4-4-216.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Gordon v. Planters & Merchants Bancshares: Punitive Damages May Be Awarded For

Bank's Wrongful Charge-Back, 51 Ark. L. Rev. 611.

CASE NOTES

Charge-Back.

The stamp of the payor bank on a check deposited with it "Pay to any bank — P. E. G." followed by the name of the bank did not constitute acceptance of the check for payment so as to preclude charging it back against the depositor's account when it

was found not to be covered by sufficient funds in the drawer's account. Douglas v. Citizens Bank, 244 Ark. 168, 424 S.W.2d 532 (1968).

Cited: Citizens Bank v. National Bank of Commerce, 334 F.2d 257 (10th Cir. 1964).

4-4-215. Final payment of item by payor bank — When provisional debits and credits become final — When certain credits become available for withdrawal.

(a) An item is finally paid by a payor bank when the bank has first done any of the following:

- (1) paid the item in cash;
- (2) settled for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement; or
- (3) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule, or agreement.

(b) If provisional settlement for an item does not become final, the item is not finally paid.

(c) If provisional settlement for an item between the presenting and payor banks is made through a clearinghouse or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the items by the payor bank.

(d) If a collecting bank receives a settlement for an item which is or becomes final, the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(e) Subject to (i) applicable law stating a time for availability of funds and (ii) any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right:

(1) if the bank has received a provisional settlement for the item, when the settlement becomes final and the bank has had a reasonable time to receive return of the item and the item has not been received within that time;

(2) if the bank is both the depositary bank and the payor bank, and the item is finally paid, at the opening of the bank's second banking day following receipt of the item.

(f) Subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit.

History. Acts 1961, No. 185, § 4-213; 1967, No. 303, § 16; A.S.A. 1947, § 85-4-213; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-213.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Gordon v. Planters & Merchants Bankshares: Punitive Damages May Be Awarded For

Bank's Wrongful Charge-Back, 51 Ark. L. Rev. 611.

CASE NOTES

ANALYSIS

Bad faith.
Charge-backs.
Damages.

Bad Faith.

Bank had had a clear duty under this section to refrain from charging-back a check against customer's account once payment had become final; the Bank's breach of this duty could have been construed to be an exercise of bad faith strictly prohibited by § 4-1-203. Gordon v. Planters & Merchants Bankshares, Inc., 326 Ark. 1046, 935 S.W.2d 544 (1996).

Charge-Backs.

A collecting bank's right to charge-back an account terminates when a settlement for the check becomes final. Gordon v. Planters & Merchants Bankshares, Inc., 326 Ark. 1046, 935 S.W.2d 544 (1996).

Damages.

Punitive damages can be awarded under subsection (d) of this section. Gordon v. Planters & Merchants Bankshares, Inc., 326 Ark. 1046, 935 S.W.2d 544 (1996).

Cited: Douglas v. Citizens Bank, 244 Ark. 168, 424 S.W.2d 532 (1968); Union Nat'l Bank v. Metropolitan Nat'l Bank, 265 Ark. 340, 578 S.W.2d 220 (1979).

4-4-216. Insolvency and preference.

(a) If an item is in or comes into the possession of a payor or collecting bank that suspends payment and the item has not been finally paid, the item must be returned by the receiver, trustee, or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(b) If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.

(c) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement's becoming final if the finality occurs automatically upon the lapse of certain time or the happening of certain events.

(d) If a collecting bank receives from subsequent parties settlement for an item, which settlement is or becomes final and the bank suspends payments without making a settlement for the item with its customer which settlement is or becomes final, the owner of the item has a preferred claim against the collecting bank.

History. Acts 1961, No. 185, § 4-214; A.S.A. 1947, § 85-4-214; Acts 1991, No. 572, § 6.

A.C.R.C. Notes. This section was formerly codified as § 4-4-214.

PART 3 — COLLECTION OF ITEMS — PAYOR BANKS

SECTION.

4-4-301. Deferred posting — Recovery of payment by return of items — Time of dishonor — Return of items by payor bank.

4-4-302. Payor bank's responsibility for late return of item.

SECTION.

4-4-303. When items subject to notice, stop-payment order, legal process, or setoff — Order in which items may be charged or certified.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. Construction and application of UCC §§ 4-301 and 4-302 making payor bank accountable for failure to act promptly on item presented for payment. 22 ALR 4th 10.

4-4-301. Deferred posting — Recovery of payment by return of items — Time of dishonor — Return of items by payor bank.

(a) If a payor bank settles for a demand item other than a documentary draft presented otherwise than for immediate payment over the counter before midnight of the banking day of receipt, the payor bank may revoke the settlement and recover the settlement if, before it has made final payment and before its midnight deadline, it:

(1) returns the item; or

(2) sends written notice of dishonor or nonpayment if the item is unavailable for return.

(b) If a demand item is received by a payor bank for credit on its books, it may return the item or send notice of dishonor and may revoke

any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in subsection (a).

(c) Unless previous notice of dishonor has been sent, an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.

(d) An item is returned:

(1) as to an item presented through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with clearinghouse rules; or

(2) in all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to instructions.

History. Acts 1961, No. 185, § 4-301; 1967, No. 303, § 17; A.S.A. 1947, § 85-4-301; Acts 1991, No. 572, § 6.

RESEARCH REFERENCES

UALR L.J. Tyler, Survey of Business Law, 3 UALR L.J. 149.

CASE NOTES

ANALYSIS

Charge-back.
Sending checks.

was found not to be covered by sufficient funds in the drawer's account. *Douglas v. Citizens Bank*, 244 Ark. 168, 424 S.W.2d 532 (1968).

Charge-Back.

The stamp of the payor bank on a check deposited with it "Pay to any bank — P. E. G." followed by the name of the bank did not constitute acceptance of the check for payment so as to preclude charging it back against the depositor's account when it

Sending Checks.

The deposit of returned checks in the mail by midnight complies with the requirement that the checks be "sent" to the bank's transferor. *Union Nat'l Bank v. Metropolitan Nat'l Bank*, 265 Ark. 340, 578 S.W.2d 220 (1979).

4-4-302. Payor bank's responsibility for late return of item.

(a) If an item is presented to and received by a payor bank, the bank is accountable for the amount of:

(1) a demand item, other than a documentary draft, whether properly payable or not, if the bank, in any case in which it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(2) any other properly payable item unless, within the time allowed for acceptance or payment of that item, the bank either accepts or pays the item or returns it and accompanying documents.

(b) The liability of a payor bank to pay an item pursuant to subsection (a) is subject to defenses based on breach of a presentment warranty (§ 4-4-208) or proof that the person seeking enforcement of

the liability presented or transferred the item for the purpose of defrauding the payor bank.

History. Acts 1961, No. 185, § 4-302; A.S.A. 1947, § 85-4-302; Acts 1991, No. 572, § 6.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 10 UALR L.J. 89.

Survey—Business Law, 14 UALR L.J. 735.

CASE NOTES

Liability.

The liability created by subdivision (a)(2) of this section is a statutory liability and is independent of liability based upon negligence. *First State Bank v. Twin City Bank*, 290 Ark. 399, 720 S.W.2d 295 (1986).

Where the documentary drafts were not known by the depositary/collecting bank

to be unauthorized until payor/drawee bank tardily sent notice of their fraudulent nature, the strict requirements of subdivision (a)(2) of this section applied and made the payor/drawee bank accountable for the drafts. *First State Bank v. Twin City Bank*, 290 Ark. 399, 720 S.W.2d 295 (1986).

4-4-303. When items subject to notice, stop-payment order, legal process, or setoff — Order in which items may be charged or certified.

(a) Any knowledge, notice, or stop-payment order received by, legal process served upon, or setoff exercised by a payor bank comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item if the knowledge, notice, stop-payment order, or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the earliest of the following:

- (1) the bank accepts or certifies the item;
- (2) the bank pays the item in cash;
- (3) the bank settles for the item without having a right to revoke the settlement under statute, clearinghouse rule, or agreement;
- (4) the bank becomes accountable for the amount of the item under § 4-4-302 dealing with the payor bank's responsibility for late return of items; or
- (5) with respect to checks, a cutoff hour no earlier than one (1) hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

(b) Subject to subsection (a), items may be accepted, paid, certified, or charged to the indicated account of its customer in any order.

History. Acts 1961, No. 185, § 4-303; A.S.A. 1947, § 85-4-303; Acts 1991, No. 572, § 6.

CASE NOTES

Remedies. Bank was entitled to pursue its rights of setoff and repossession and sale simultaneously. *Neel v. Citizens First State Bank*, 28 Ark. App. 116, 771 S.W.2d 303 (1989).

PART 4 — RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER

SECTION.	SECTION.
4-4-401. When bank may charge customer's account.	more than six (6) months old.
4-4-402. Bank's liability to customer for wrongful dishonor — Time of determining insufficiency of account.	4-4-405. Death or incompetence of customer.
4-4-403. Customer's right to stop payment — Burden of proof of loss.	4-4-406. Customer's duty to discover and report unauthorized signature or alteration — Comparative fault.
4-4-404. Bank not obliged to pay check	4-4-407. Payor bank's right to subrogation on improper payment.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. What constitutes wrongful dishonor of check rendering payor bank liable to drawer under UCC § 4-402. 88 ALR 4th 568.
Who may recover for wrongful dishonor of check under UCC § 4-402. 88 ALR 4th 613.
Damages recoverable for wrongful dishonor of check under UCC § 4-402. 88 ALR 4th 644.

4-4-401. When bank may charge customer's account.

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

(b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in § 4-4-

403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in § 4-4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under § 4-4-402.

(d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) the original terms of the altered item; or

(2) the terms of the completed item, even though the bank knows the item has been completed, unless the bank has notice that the completion was improper.

History. Acts 1961, No. 185, § 4-401; 401; Acts 1991, No. 47, § 1; 1991, No. 572, 1967, No. 303, § 18; A.S.A. 1947, § 85-4- § 6.

4-4-402. Bank's liability to customer for wrongful dishonor — Time of determining insufficiency of account.

(a) Except as otherwise provided in this chapter, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.

(b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

(c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one (1) determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

History. Acts 1961, No. 185, § 4-402; A.S.A. 1947, § 85-4-402; Acts 1991, No. 572, § 6.

RESEARCH REFERENCES

ALR. What constitutes wrongful dishonor of check rendering payor bank liable to drawer under UCC § 4-402. 88 ALR 4th 568.

Who may recover for wrongful dishonor of check under UCC § 4-402. 88 ALR 4th 613.

Damages recoverable for wrongful dishonor of check under UCC § 4-402. 88 ALR 4th 644.

Ark. L. Rev. Comment, Gordon v.

Planters & Merchants Bancshares: Punitive Damages May Be Awarded For Bank's Wrongful Charge-Back, 51 Ark. L. Rev. 611.

UALR L.J. Arkansas Law Survey, Looney, Business Law, 8 UALR L.J. 99.

CASE NOTES

ANALYSIS

Damages.

Mental suffering.

Damages.

Although the general rule is that damages may not be allowed where they are speculative, resting only upon conjectural evidence, or the opinions of the parties or witnesses, there are instances where damages cannot be proven with exactness, and where the cause and existence of damages caused by a bank's wrongful dishonor have been established by the evidence,

recovery will not be denied merely because the damages cannot be determined with exactness. *Twin City Bank v. Isaacs*, 283 Ark. 127, 672 S.W.2d 651 (1984).

Mental Suffering.

The language of this section impliedly recognizes mental suffering and other intangible injuries as recoverable. *Twin City Bank v. Isaacs*, 283 Ark. 127, 672 S.W.2d 651 (1984).

Cited: *City Nat'l Bank v. Goodwin*, 301 Ark. 182, 783 S.W.2d 335 (1990); *Gordon v. Planters & Merchants Bankshares, Inc.*, 326 Ark. 1046, 935 S.W.2d 544 (1996).

4-4-403. Customer's right to stop payment — Burden of proof of loss.

(a) A customer or any person authorized to draw on the account if there is more than one (1) person may stop payment of any item drawn on the customer's account or close the account by an order to the bank describing the item or account with reasonable certainty received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in § 4-4-303. If the signature of more than one (1) person is required to draw on an account, any of these persons may stop payment or close the account.

(b) A stop-payment order is effective for six (6) months, but it lapses after fourteen (14) calendar days if the original order was oral and was not confirmed in writing within that period. A stop-payment order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop-payment order is effective.

(c) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under § 4-4-402.

History. Acts 1961, No. 185, § 4-403; A.S.A. 1947, § 85-4-403; Acts 1991, No. 572, § 6.

CASE NOTES

Opportunity to Act.

Stop-payment order was received in such manner as to afford defendant bank

a reasonable opportunity to act upon it. First State Bank v. Dixon, 21 Ark. App. 17, 728 S.W.2d 192 (1987).

4-4-404. Bank not obliged to pay check more than six (6) months old.

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six (6) months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

History. Acts 1961, No. 185, § 4-404; A.S.A. 1947, § 85-4-404; Acts 1991, No. 572, § 6.

RESEARCH REFERENCES

UALR L.J. Survey—Business Law, 14 UALR L.J. 735.

Murphey, The Discontinuance of the

Certified Check — An Arkansas Study, 16 UALR L.J. 555.

CASE NOTES

Liability of Maker.

This section was adopted for the protection of banks and does not extinguish the maker's liability on a valid check merely because it was more than six months past due or preclude a claim against an estate

on the basis of such a check. Hartsook v. Owens, 236 Ark. 790, 370 S.W.2d 69 (1963).

Cited: United States v. Baptist Golden Age Home, 226 F. Supp. 892 (W.D. Ark. 1964).

4-4-405. Death or incompetence of customer.

(a) A payor or collecting bank's authority to accept, pay, or collect an item or to account for proceeds of its collection, if otherwise effective, is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(b) Even with knowledge, a bank may for ten (10) days after the date of death pay or certify checks drawn on or before that date unless ordered to stop payment by a person claiming an interest in the account.

History. Acts 1961, No. 185, § 4-405; A.S.A. 1947, § 85-4-405; Acts 1991, No. 572, § 6.

4-4-406. Customer's duty to discover and report unauthorized signature or alteration — Comparative fault.

(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.

(b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven (7) years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.

(c) If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c), the customer is precluded from asserting against the bank:

(1) the customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(2) the customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty (30) days, in which to examine the item or statement of account and notify the bank.

(e) If subsection (d) applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (c) and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement

or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under § 4-4-208 with respect to the unauthorized signature or alteration to which the preclusion applies.

History. Acts 1961, No. 185, § 4-406; 564, § 2; 1987, No. 565, § 1; Acts 1991, A.S.A. 1947, § 85-4-406; Acts 1987, No. 572, § 6.

RESEARCH REFERENCES

UALR L.J. Survey—Uniform Commercial Code, 10 UALR L.J. 613.

Survey—Business Law, 14 UALR L.J. 735.

CASE NOTES

ANALYSIS

Laches and estoppel.
Lack of ordinary care.
Statements of accounts.
Statute of limitations.
Unauthorized signatures.

Laches and Estoppel.

Corporation could not recover from bank which allowed the corporation's bookkeeper to receive cash when she deposited checks marked "For Deposit Only," even though allowing cash to be given on such deposits was a breach of an implied contract by the bank, since plaintiff had allowed this practice to go on for more than the statutory period of years without complaining. *J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 836 S.W.2d 853 (1992).

Lack of Ordinary Care.

A bank is precluded from using the defense that the customer did not promptly notify it of an unauthorized signature after statements were available to the customer, if the evidence establishes a lack of care on the part of the bank. *First Nat'l Bank v. Hobbs*, 248 Ark. 76, 450 S.W.2d 298 (1970).

Statements of Accounts.

A depositor is not excused from his duty of examining his bank statement with reasonable dispatch and care and informing the bank of any errors by entrusting performance of this duty to an incompetent or dishonest agent in the absence of

reasonable diligence in supervising his conduct. *Pine Bluff Nat'l Bank v. Kesterson*, 257 Ark. 813, 520 S.W.2d 253 (1975).

The usage and custom of a bank in delivering statements and cancelled checks to its depositors is competent evidence to prove delivery was effectuated. *Cooley v. First Nat'l Bank*, 276 Ark. 387, 635 S.W.2d 250 (1982).

Where bank statements are mailed to the address provided by the depositors as reflected on the signature card, they are "available" within the meaning of subsection (a) of this section. *Cooley v. First Nat'l Bank*, 276 Ark. 387, 635 S.W.2d 250 (1982) (decision under prior law).

Statute of Limitations.

Subsection (f) of this section is not a statute of limitations, but rather, it creates an absolute bar as it is a rule of substantive law which is a condition precedent to an action. *Pine Bluff Nat'l Bank v. Kesterson*, 257 Ark. 813, 520 S.W.2d 253 (1975); *Coast-to-Coast Stores, Inc. v. Citizens Bank*, 676 F. Supp. 923 (E.D. Ark. 1987) (decision under prior law).

Evidence was sufficient to support conclusion that depositor had knowledge of unauthorized withdrawals and yet failed to act within the time allowed under subsection (f) of this section. *Cooley v. First Nat'l Bank*, 276 Ark. 387, 635 S.W.2d 250 (1982) (decision under prior law).

Depositor held to have acted within the time allowed under subsection (f) of this section where it notified bank within 4

months of the unauthorized withdrawal but did not file suit within the time allowed for discovering and reporting unauthorized signatures. *Coast-to-Coast Stores, Inc. v. Citizens Bank*, 676 F. Supp. 923 (E.D. Ark. 1987).

Unauthorized Signatures.

Where the authorized signature of a trust fund required the joint signatures of three trustees, any purported signature of less than three trustees was an “unauthorized signature.” *Pine Bluff Nat’l Bank v. Kesterson*, 257 Ark. 813, 520 S.W.2d 253 (1975).

The bank’s payment of a check or withdrawal on less than the required number of signatures renders the signature “unauthorized” within the meaning of this section and requires the customer to discover and report it within one year from the time the statement and items are made available. *Cooley v. First Nat’l Bank*, 276 Ark. 387, 635 S.W.2d 250 (1982).

Cited: *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970).

4-4-407. Payor bank’s right to subrogation on improper payment.

If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights

- (1) of any holder in due course on the item against the drawer or maker;
- (2) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and
- (3) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

History. Acts 1961, No. 185, § 4-407; A.S.A. 1947, § 85-4-407; Acts 1991, No. 572, § 6.

CASE NOTES

Cited: *Johnson v. Eudora Bank*, 257 Ark. 518, 517 S.W.2d 957 (1975).

PART 5 — COLLECTION OF DOCUMENTARY DRAFTS

SECTION.	SECTION.
4-4-501. Handling of documentary drafts — Duty to send for presentment and to notify customer of dishonor.	bank for documents and goods — Report of reasons for dishonor — Referee in case of need.
4-4-502. Presentment of “on arrival” drafts.	4-4-504. Privilege of presenting bank to deal with goods — Security interest for expenses.
4-4-503. Responsibility of presenting	

4-4-501. Handling of documentary drafts — Duty to send for presentment and to notify customer of dishonor.

A bank that takes a documentary draft for collection shall present or send the draft and accompanying documents for presentment and, upon learning that the draft has not been paid or accepted in due course, shall seasonably notify its customer of the fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

History. Acts 1961, No. 185, § 4-501; A.S.A. 1947, § 85-4-501; Acts 1991, No. 572, § 6.

4-4-502. Presentment of “on arrival” drafts.

If a draft or the relevant instructions require presentment “on arrival”, “when goods arrive” or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of the refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

History. Acts 1961, No. 185, § 4-502; A.S.A. 1947, § 85-4-502; Acts 1991, No. 572, § 6.

4-4-503. Responsibility of presenting bank for documents and goods — Report of reasons for dishonor — Referee in case of need.

Unless otherwise instructed and except as provided in chapter 5 of this subtitle, a bank presenting a documentary draft:

(1) must deliver the documents to the drawee on acceptance of the draft if it is payable more than three (3) days after presentment; otherwise, only on payment; and

(2) upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or, if the presenting bank does not choose to utilize the referee’s services, it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions.

However, the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for those expenses.

History. Acts 1961, No. 185, § 4-503;
A.S.A. 1947, § 85-4-503; Acts 1991, No.
572, § 6.

**4-4-504. Privilege of presenting bank to deal with goods —
Security interest for expenses.**

(a) A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(b) For its reasonable expenses incurred by action under subsection (a), the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

History. Acts 1961, No. 185, § 4-504;
A.S.A. 1947, § 85-4-504; Acts 1991, No.
572, § 6.

CHAPTER 4A

FUNDS TRANSFERS

PART.

- 1. SUBJECT MATTER AND DEFINITIONS.
- 2. ISSUE AND ACCEPTANCE OF PAYMENT ORDER.
- 3. EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK.
- 4. PAYMENT.
- 5. MISCELLANEOUS PROVISIONS.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

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| Am. Jur. 17 Am. Jur. 2d, Consumer Pro., § 226 et seq. | Changes They Will Make, 46 Ark. L. Rev. 501. |
| Ark. L. Rev. Murphey, Revised Article 3 and Amended Article 4 of the Uniform Commercial Code: Comments on the | UALR L.J. Survey—Business Law, 14 UALR L.J. 735. |

PART 1 — SUBJECT MATTER AND DEFINITIONS

SECTION.

- 4-4A-101. Short title.
- 4-4A-102. Subject matter.
- 4-4A-103. Payment order — Definitions.
- 4-4A-104. Funds transfer — Definitions.

SECTION.

- 4-4A-105. Other definitions.
- 4-4A-106. Time payment order is received.
- 4-4A-107. Federal Reserve regulations and operating circulars.

SECTION.

4-4A-108. Exclusion of consumer transactions governed by federal law.

4-4A-101. Short title.

This chapter may be cited as Uniform Commercial Code — Funds Transfers.

History. Acts 1991, No. 540, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

4-4A-102. Subject matter.

Except as otherwise provided in § 4-4A-108, this chapter applies to funds transfers defined in § 4-4A-104.

History. Acts 1991, No. 540, § 1.

4-4A-103. Payment order — Definitions.

(a) In this chapter:

(1) "Payment order" means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

(i) the instruction does not state a condition to payment to the beneficiary other than time of payment,

(ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(iii) the instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system for transmittal to the receiving bank.

(2) "Beneficiary" means the person to be paid by the beneficiary's bank.

(3) "Beneficiary's bank" means the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(4) "Receiving bank" means the bank to which the sender's instruction is addressed.

(5) "Sender" means the person giving the instruction to the receiving bank.

(b) If an instruction complying with subsection (a)(1) is to make more than one (1) payment to a beneficiary, the instruction is a separate payment order with respect to each payment.

(c) A payment order is issued when it is sent to the receiving bank.

History. Acts 1991, No. 540, § 1.

4-4A-104. Funds transfer — Definitions.

In this chapter:

(a) “Funds transfer” means the series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator’s bank or an intermediary bank intended to carry out the originator’s payment order. A funds transfer is completed by acceptance by the beneficiary’s bank of a payment order for the benefit of the beneficiary of the originator’s payment order.

(b) “Intermediary bank” means a receiving bank other than the originator’s bank or the beneficiary’s bank.

(c) “Originator” means the sender of the first payment order in a funds transfer.

(d) “Originator’s bank” means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

History. Acts 1991, No. 540, § 1.

4-4A-105. Other definitions.

(a) In this chapter:

(1) “Authorized account” means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.

(2) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this chapter.

(3) “Customer” means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.

(4) “Funds-transfer business day” of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

(5) “Funds-transfer system” means a wire transfer network, automated clearinghouse, or other communication system of a clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.

(6) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) “Prove” with respect to a fact means to meet the burden of establishing the fact (§ 4-1-201(8)).

(b) Other definitions applying to this chapter and the sections in which they appear are:

“Acceptance”. Section 4-4A-209.

“Beneficiary”. Section 4-4A-103.

“Beneficiary’s bank”. Section 4-4A-103.

“Executed”. Section 4-4A-301.

“Execution date”. Section 4-4A-301.

“Funds transfer”. Section 4-4A-104.

“Funds-transfer system rule”. Section 4-4A-501.

“Intermediary bank”. Section 4-4A-104.

“Originator”. Section 4-4A-104.

“Originator’s bank”. Section 4-4A-104.

“Payment by beneficiary’s bank to beneficiary”. Section 4-4A-405.

“Payment by originator to beneficiary”. Section 4-4A-406.

“Payment by sender to receiving bank”. Section 4-4A-403.

“Payment date”. Section 4-4A-401.

“Payment order”. Section 4-4A-103.

“Receiving bank”. Section 4-4A-103.

“Security procedure”. Section 4-4A-201.

“Sender”. Section 4-4A-103.

(c) The following definitions in chapter 4 apply to this chapter:

“Clearinghouse”. Section 4-4-104.

“Item”. Section 4-4-104.

“Suspends payments”. Section 4-4-104.

(d) In addition chapter 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History. Acts 1991, No. 540, § 1.

4-4A-106. Time payment order is received.

(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in § 4-1-201(27). A receiving bank may fix a cut-off time or times on a funds-transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cut-off times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cut-off time may apply to senders generally or different cut-off times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cut-off time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this chapter refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and

the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this chapter.

History. Acts 1991, No. 540, § 1.

4-4A-107. Federal Reserve regulations and operating circulars.

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

History. Acts 1991, No. 540, § 1.

4-4A-108. Exclusion of consumer transactions governed by federal law.

This chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. 1693 et seq.) as amended from time to time.

History. Acts 1991, No. 540, § 1.

PART 2 — ISSUE AND ACCEPTANCE OF PAYMENT ORDER

SECTION.	SECTION.
4-4A-201. Security procedure.	other communication system.
4-4A-202. Authorized and verified payment orders.	4-4A-207. Misdescription of beneficiary.
4-4A-203. Unenforceability of certain verified payment orders.	4-4A-208. Misdescription of intermediary bank or beneficiary's bank.
4-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.	4-4A-209. Acceptance of payment order.
4-4A-205. Erroneous payment orders.	4-4A-210. Rejection of payment order.
4-4A-206. Transmission of payment order through funds-transfer or	4-4A-211. Cancellation and amendment of payment order.
	4-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

4-4A-201. Security procedure.

“Security procedure” means a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.

History. Acts 1991, No. 540, § 1.

4-4A-202. Authorized and verified payment orders.

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

(d) The term “sender” in this chapter includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under subsection (a), or it is effective as the order of the customer under subsection (b).

(e) This section applies to amendments and cancellations of payment orders to the same extent it applies to payment orders.

(f) Except as provided in this section and in § 4-4A-203(a)(1), rights and obligations arising under this section or § 4-4A-203 may not be varied by agreement.

History. Acts 1991, No. 540, § 1.

4-4A-203. Unenforceability of certain verified payment orders.

(a) If an accepted payment order is not, under § 4-4A-202(a), an authorized order of a customer identified as sender, but is effective as an order of the customer pursuant to § 4-4A-202(b), the following rules apply:

(1) By express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order.

(2) The receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person (i) entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure, or (ii) who obtained access to transmitting facilities of the customer or who obtained, from a source controlled by the customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

(b) This section applies to amendments of payment orders to the same extent it applies to payment orders.

History. Acts 1991, No. 540, § 1.

4-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under § 4-4A-202, or (ii) not enforceable, in whole or in part, against the customer under § 4-4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety (90) days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) may be fixed by agreement as stated in § 4-1-204(1), but the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.

History. Acts 1991, No. 540, § 1.

4-4A-205. Erroneous payment orders.

(a) If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order (i) erroneously instructed payment to a beneficiary not intended by the sender, (ii) erroneously instructed payment in an amount greater than the amount intended by the sender, or (iii) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

(1) If the sender proves that the sender or a person acting on behalf of the sender pursuant to § 4-4A-206 complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in paragraphs (2) and (3).

(2) If the funds transfer is completed on the basis of an erroneous payment order described in clause (i) or (iii) of subsection (a), the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(3) If the funds transfer is completed on the basis of a payment order described in clause (ii) of subsection (a), the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution.

(b) If (i) the sender of an erroneous payment order described in subsection (a) is not obliged to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety (90) days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(c) This section applies to amendments to payment orders to the same extent it applies to payment orders.

History. Acts 1991, No. 540, § 1.

4-4A-206. Transmission of payment order through funds-transfer or other communication system.

(a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system

for transmittal to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. This section does not apply to a funds-transfer system of the Federal Reserve banks.

(b) This section applies to cancellations and amendments of payment orders to the same extent it applies to payment orders.

History. Acts 1991, No. 540, § 1.

4-4A-207. Misdescription of beneficiary.

(a) Subject to subsection (b), if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur.

(b) If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank account number and the name and number identify different persons, the following rules apply:

(1) Except as otherwise provided in subsection (c), if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person.

(2) If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur.

(c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's payment order described the beneficiary inconsistently by name and number, and (iii) the beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the following rules apply:

(1) If the originator is a bank, the originator is obliged to pay its order.

(2) If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by

any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(d) In a case governed by subsection (b)(1), if the beneficiary's bank rightfully pays the person identified by number and that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution as follows:

(1) If the originator is obliged to pay its payment order as stated in subsection (c), the originator has the right to recover.

(2) If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover.

History. Acts 1991, No. 540, § 1.

4-4A-208. Misdescription of intermediary bank or beneficiary's bank.

(a) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number.

(1) The receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank and need not determine whether the number identifies a bank.

(2) The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify different persons.

(1) If the sender is a bank, the receiving bank may rely on the number as the proper identification of the intermediary or beneficiary's bank if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order.

(2) If the sender is not a bank and the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the intermediary or beneficiary's bank even if it identifies a person different from the bank identified by name, the rights and obligations of the sender and the receiving bank are governed by subsection (b)(1), as though the sender were a bank. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates.

(3) Regardless of whether the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person.

(4) If the receiving bank knows that the name and number identify different persons, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in § 4-4A-302(a)(1).

History. Acts 1991, No. 540, § 1.

4-4A-209. Acceptance of payment order.

(a) Subject to subsection (d), a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order.

(b) Subject to subsections (c) and (d), a beneficiary's bank accepts a payment order at the earliest of the following times:

(1) when the bank (i) pays the beneficiary as stated in § 4-4A-405(a) or § 4-4A-405(b), or (ii) notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order;

(2) when the bank receives payment of the entire amount of the sender's order pursuant to § 4-4A-403(a)(1) or § 4-4A-403(a)(2); or

(3) the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within (i) one (1) hour after that time, or (ii) one (1) hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly.

(c) Acceptance of a payment order cannot occur before the order is received by the receiving bank. Acceptance does not occur under subsection (b)(2) or (b)(3) if the beneficiary of the payment order does not have an account with the receiving bank, the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account.

(d) A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or

the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently cancelled pursuant to § 4-4A-211(b), the bank may recover from the beneficiary any payment received to the extent allowed by the law governing mistake and restitution.

History. Acts 1991, No. 540, § 1.

4-4A-210. Rejection of payment order.

(a) A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, (i) any means complying with the agreement is reasonable and (ii) any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means.

(b) This subsection applies if a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order. If the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is cancelled pursuant to § 4-4A-211(d) or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly.

(c) If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments.

(d) Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order.

History. Acts 1991, No. 540, § 1.

4-4A-211. Cancellation and amendment of payment order.

(a) A communication of the sender of a payment order cancelling or amending the order may be transmitted to the receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment.

(b) Subject to subsection (a), a communication by the sender cancelling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank.

(1) With respect to a payment order accepted by a receiving bank other than the beneficiary's bank, cancellation or amendment is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank is also made.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is cancelled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

(d) An unaccepted payment order is cancelled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order.

(e) A cancelled payment order cannot be accepted. If an accepted payment order is cancelled, the acceptance is nullified and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be cancellation of the original order at the time of amendment and issue of a new payment order in the amended form at the same time.

(f) Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether

or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

(g) A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has reasonable opportunity to act before acceptance of the order.

(h) A funds-transfer system rule is not effective to the extent it conflicts with subsection (c)(2).

History. Acts 1991, No. 540, § 1.

4-4A-212. Liability and duty of receiving bank regarding unaccepted payment order.

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this chapter, but does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in this chapter or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in § 4-4A-209, and liability is limited to that provided in this chapter. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this chapter or by express agreement.

History. Acts 1991, No. 540, § 1.

PART 3 — EXECUTION OF SENDER'S PAYMENT ORDER BY RECEIVING BANK

SECTION.

- 4-4A-301. Execution and execution date.
4-4A-302. Obligations of receiving bank
in execution of payment
order.
4-4A-303. Erroneous execution of pay-
ment order.

SECTION.

- 4-4A-304. Duty of sender to report erro-
neously executed payment
order.
4-4A-305. Liability for late or improper
execution or failure to exe-
cute payment order.

4-4A-301. Execution and execution date.

(a) A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed.

(b) "Execution date" of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender's order. The execution date may be determined by instruction of

the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date.

History. Acts 1991, No. 540, § 1.

4-4A-302. Obligations of receiving bank in execution of payment order.

(a) Except as provided in subsections (b) through (d), if the receiving bank accepts a payment order pursuant to § 4-4A-209(a), the bank has the following obligations in executing the order:

(1) The receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning (i) any intermediary bank or funds-transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order it accepts.

(2) If the sender's instruction states that the funds transfer is to be carried out telephonically or by wire transfer or otherwise indicates that the funds transfer is to be carried out by the most expeditious means, the receiving bank is obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible.

(b) Unless otherwise instructed, a receiving bank executing a payment order may (i) use any funds-transfer system if use of that system is reasonable in the circumstances, and (ii) issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer.

(c) Unless subsection (a)(2) applies or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the

sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated.

(d) Unless instructed by the sender, (i) the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges, and (ii) may not instruct a subsequent receiving bank to obtain payment of its charges in the same manner.

History. Acts 1991, No. 540, § 1.

4-4A-303. Erroneous execution of payment order.

(a) A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under § 4-4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

(b) A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under § 4-4A-402(c) if (i) that subsection is otherwise satisfied and (ii) the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order it accepted only to the extent of the amount of the erroneous order. This subsection does not apply if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of its charges for services and expenses pursuant to instruction of the sender.

(c) If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed and all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received to the extent allowed by the law governing mistake and restitution.

History. Acts 1991, No. 540, § 1.

4-4A-304. Duty of sender to report erroneously executed payment order.

If the sender of a payment order that is erroneously executed as stated in § 4-4A-303 receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding ninety (90) days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under § 4-4A-402(d) for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in this section.

History. Acts 1991, No. 540, § 1.

4-4A-305. Liability for late or improper execution or failure to execute payment order.

(a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of § 4-4A-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(b) If execution of a payment order by a receiving bank in breach of § 4-4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.

(c) In addition to the amounts payable under subsections (a) and (b), damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank.

(d) If a receiving bank fails to execute a payment order it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable.

(e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement

under subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

(f) Except as stated in this section, the liability of a receiving bank under subsections (a) and (b) may not be varied by agreement.

History. Acts 1991, No. 540, § 1.

PART 4 — PAYMENT

SECTION.

4-4A-401. Payment date.

4-4A-402. Obligation of sender to pay receiving bank.

4-4A-403. Payment by sender to receiving bank.

4-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

SECTION.

4-4A-405. Payment by beneficiary's bank to beneficiary.

4-4A-406. Payment by originator to beneficiary — Discharge of underlying obligation.

4-4A-401. Payment date.

"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank.

History. Acts 1991, No. 540, § 1.

4-4A-402. Obligation of sender to pay receiving bank.

(a) This section is subject to §§ 4-4A-205 and 4-4A-207.

(b) With respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order.

(c) This subsection is subject to subsection (e) and to § 4-4A-303. With respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of that sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order.

(d) If the sender of a payment order pays the order and was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent the sender was not

obliged to pay. Except as provided in §§ 4-4A-204 and 4-4A-304, interest is payable on the refundable amount from the date of payment.

(e) If a funds transfer is not completed as stated in subsection (c) and an intermediary bank is obliged to refund payment as stated in subsection (d) but is unable to do so because not permitted by applicable law or because the bank suspends payments, a sender in the funds transfer that executed a payment order in compliance with an instruction, as stated in § 4-4A-302(a)(1), to route the funds transfer through that intermediary bank is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in subsection (d).

(f) The right of the sender of a payment order to be excused from the obligation to pay the order as stated in subsection (c) or to receive refund under subsection (d) may not be varied by agreement.

History. Acts 1991, No. 540, § 1.

4-4A-403. Payment by sender to receiving bank.

(a) Payment of the sender's obligation under § 4-4A-402 to pay the receiving bank occurs as follows:

(1) If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a Federal Reserve bank or through a funds-transfer system.

(2) If the sender is a bank and the sender (i) credited an account of the receiving bank with the sender, or (ii) caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact.

(3) If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made to the extent the debit is covered by a withdrawable credit balance in the account.

(b) If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members

of the system. The aggregate balance is determined after the right of setoff stated in the second sentence of this subsection has been exercised.

(c) If two (2) banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under § 4-4A-402 will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one (1) bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other.

(d) In a case not covered by subsection (a), the time when payment of the sender's obligation under § 4-4A-402(b) or § 4-4A-402(c) occurs is governed by applicable principles of law that determine when an obligation is satisfied.

History. Acts 1991, No. 540, § 1.

4-4A-404. Obligation of beneficiary's bank to pay and give notice to beneficiary.

(a) Subject to §§ 4-4A-211(e), 4-4A-405(d), and 4-4A-405(e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable attorney's fees are also recoverable if demand for interest is made and refused before an action is brought on the claim.

(c) The right of a beneficiary to receive payment and damages as stated in subsection (a) may not be varied by agreement or a funds-

transfer system rule. The right of a beneficiary to be notified as stated in subsection (b) may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer.

History. Acts 1991, No. 540, § 1.

4-4A-405. Payment by beneficiary's bank to beneficiary.

(a) If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under § 4-4A-404(a) occurs when and to the extent (i) the beneficiary is notified of the right to withdraw the credit, (ii) the bank lawfully applies the credit to a debt of the beneficiary, or (iii) funds with respect to the order are otherwise made available to the beneficiary by the bank.

(b) If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under § 4-4A-404(a) occurs is governed by principles of law that determine when an obligation is satisfied.

(c) Except as stated in subsections (d) and (e), if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable.

(d) A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order it accepted. A beneficiary's bank that makes a payment that is provisional under the rule is entitled to refund from the beneficiary if (i) the rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated, (ii) the beneficiary, the beneficiary's bank and the originator's bank agreed to be bound by the rule, and (iii) the beneficiary's bank did not receive payment of the payment order that it accepted. If the beneficiary is obliged to refund payment to the beneficiary's bank, acceptance of the payment order by the beneficiary's bank is nullified and no payment by the originator of the funds transfer to the beneficiary occurs under § 4-4A-406.

(e) This subsection applies to a funds transfer that includes a payment order transmitted over a funds-transfer system that (i) nets obligations multilaterally among participants, and (ii) has in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of one (1) or more participants that do not meet their settlement obligations. If the beneficiary's bank in the funds transfer accepts a payment order and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer, (i) the acceptance by the beneficiary's bank is nullified and no person has any right or

obligation based on the acceptance, (ii) the beneficiary's bank is entitled to recover payment from the beneficiary, (iii) no payment by the originator to the beneficiary occurs under § 4-4A-406, and (iv) subject to § 4-4A-402(e), each sender in the funds transfer is excused from its obligation to pay its payment order under § 4-4A-402(c) because the funds transfer has not been completed.

History. Acts 1991, No. 540, § 1.

4-4A-406. Payment by originator to beneficiary — Discharge of underlying obligation.

(a) Subject to §§ 4-4A-211(e), 4-4A-405(d), and 4-4A-405(e), the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order.

(b) If payment under subsection (a) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money, unless (i) the payment under subsection (a) was made by a means prohibited by the contract of the beneficiary with respect to the obligation, (ii) the beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment, (iii) funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary, and (iv) the beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract. If payment by the originator does not result in discharge under this section, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under § 4-4A-404(a).

(c) For the purpose of determining whether discharge of an obligation occurs under subsection (b), if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one (1) or more receiving banks in the funds transfer, payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

(d) Rights of the originator or of the beneficiary of a funds transfer under this section may be varied only by agreement of the originator and the beneficiary.

History. Acts 1991, No. 540, § 1.

PART 5 — MISCELLANEOUS PROVISIONS

SECTION.

4-4A-501. Variation by agreement and effect of funds-transfer system rule.

4-4A-502. Creditor process served on receiving bank — Setoff by beneficiary's bank.

4-4A-503. Injunction or restraining order with respect to funds transfer.

SECTION.

4-4A-504. Order in which items and payment orders may be charged to account — Order of withdrawals from account.

4-4A-505. Preclusion of objection to debit of customer's account.

4-4A-506. Rate of interest.

4-4A-507. Choice of law.

4-4A-501. Variation by agreement and effect of funds-transfer system rule.

(a) Except as otherwise provided in this chapter, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.

(b) "Funds-transfer system rule" means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Federal Reserve bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this chapter, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this chapter and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in §§ 4-4A-404(c), 4-4A-405(d), and 4-4A-507(c).

History. Acts 1991, No. 540, § 1.

4-4A-502. Creditor process served on receiving bank — Setoff by beneficiary's bank.

(a) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(b) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a

reasonable opportunity to act on it before the bank accepts the payment order.

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(2) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(3) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(d) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

History. Acts 1991, No. 540, § 1.

4-4A-503. Injunction or restraining order with respect to funds transfer.

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

History. Acts 1991, No. 540, § 1.

4-4A-504. Order in which items and payment orders may be charged to account — Order of withdrawals from account.

(a) If a receiving bank has received more than one (1) payment order of the sender or one (1) or more payment orders and other items that are payable from the sender's account, the bank may charge the sender's account with respect to the various orders and items in any sequence.

(b) In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied.

History. Acts 1991, No. 540, § 1.

4-4A-505. Preclusion of objection to debit of customer's account.

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one (1) year after the notification was received by the customer.

History. Acts 1991, No. 540, § 1.

4-4A-506. Rate of interest.

(a) If, under this chapter, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the amount payable may be determined (i) by agreement of the sender and receiving bank, or (ii) by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system.

(b) If the amount of interest is not determined by an agreement or rule as stated in subsection (a), the amount is calculated by multiplying the applicable Federal Funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable Federal Funds rate is the average of the Federal Funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable divided by three hundred sixty (360). The Federal Funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank.

History. Acts 1991, No. 540, § 1.

4-4A-507. Choice of law.

(a) The following rules apply unless the affected parties otherwise agree or subsection (c) applies:

(1) The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located.

(2) The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located.

(3) The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located.

(b) If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

(c) A funds-transfer system rule may select the law of a particular jurisdiction to govern (i) rights and obligations between participating banks with respect to payment orders transmitted or processed through the system, or (ii) the rights and obligations of some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to clause (i) is binding on participating banks. A choice of law made pursuant to clause (ii) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system. The law of a jurisdiction selected pursuant to this subsection may govern, whether or not that law bears a reasonable relation to the matter in issue.

(d) In the event of inconsistency between an agreement under subsection (b) and a choice-of-law rule under subsection (c), the agreement under subsection (b) prevails.

(e) If a funds transfer is made by use of more than one (1) funds-transfer system and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue.

History. Acts 1991, No. 540, § 1.

CHAPTER 5

LETTERS OF CREDIT

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- 4-5-120. Savings clause.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Former chapter 5, concerning letters of credit, was repealed by Acts 1997, No. 1070, § 1. The former chapter was derived from the following sources:

- 4-5-101. Acts 1961, No. 185, § 5-101; A.S.A. 1947, § 85-5-101.
- 4-5-102. Acts 1961, No. 185, § 5-102; A.S.A. 1947, § 85-5-102.
- 4-5-103. Acts 1961, No. 185, § 5-103; A.S.A. 1947, § 85-5-103.
- 4-5-104. Acts 1961, No. 185, § 5-104; A.S.A. 1947, § 85-5-104.
- 4-5-105. Acts 1961, No. 185, § 5-105; A.S.A. 1947, § 85-5-105.
- 4-5-106. Acts 1961, No. 185, § 5-106; A.S.A. 1947, § 85-5-106.
- 4-5-107. Acts 1961, No. 185, § 5-107; A.S.A. 1947, § 85-5-107.
- 4-5-108. Acts 1961, No. 185, § 5-108; A.S.A. 1947, § 85-5-108.
- 4-5-109. Acts 1961, No. 185, § 5-109; A.S.A. 1947, § 85-5-109.
- 4-5-110. Acts 1961, No. 185, § 5-110; A.S.A. 1947, § 85-5-110.
- 4-5-111. Acts 1961, No. 185, § 5-111; A.S.A. 1947, § 85-5-111.
- 4-5-112. Acts 1961, No. 185, § 5-112; A.S.A. 1947, § 85-5-112.
- 4-5-113. Acts 1961, No. 185, § 5-113; A.S.A. 1947, § 85-5-113.
- 4-5-114. Acts 1961, No. 185, § 5-114; 1985, No. 514, § 2; A.S.A. 1947, § 85-5-114; Acts 1995, No. 425, § 5.
- 4-5-115. Acts 1961, No. 185, § 5-115; A.S.A. 1947, § 85-5-115.
- 4-5-116. Acts 1961, No. 185, § 5-116; 1973, No. 116, § 4; A.S.A. 1947, § 85-5-116.

- 4-5-117. Acts 1961, No. 185, § 5-117; A.S.A. 1947, § 85-5-117.

Effective Dates. Acts 1973, No. 116, § 6: Jan. 1, 1974.

Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

ALR. Letter of credit: What constitutes under UCC §§ 5-102, 5-103. 44 ALR 4th 172.

What constitutes compliance of docu-

ments presented with terms of letter of credit so as to require honor of draft under UCC § 5-114. 8 ALR 5th 463.

Applicability of waiver of estoppel to

preclude claim of nonconformance of documents as ground for dishonor of presentment under letter of credit under UCC § 5-114. 53 ALR 5th 667.

Validity, construction, and application of Uniform Customs and Practice for Documentary Credits (UCP). 56 ALR 5th 565.

Am. Jur. 50 Am. Jur. 2d, Letter Cred., § 1 et seq.

Ark. L. Notes. Laurence, A Statutory Primer: Article 5 of the Uniform Commercial Code—Letters of Credit, 1987 Ark. L. Notes 72.

Ark. L. Rev. Bank Deposits and Collections: Article IV — Letters of Credit: Article V, 16 Ark. L. Rev. 45.

CASE NOTES

Cited: Tradax Am., Inc. v. First Nat'l Bank, 934 F.2d 969 (8th Cir. 1991).

4-5-101. Short title.

This chapter may be cited as Uniform Commercial Code—Letters of Credit.

History. Acts 1997, No. 1070, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

CASE NOTES

Cited: In re Sugarloaf Mining Co., 310 Ark. 772, 840 S.W.2d 172 (1992), supp. op., 310 Ark. 782A (1992) (decision under prior law).

4-5-102. Definitions.

(a) In this chapter:

(1) "Adviser" means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.

(2) "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.

(3) "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.

(4) "Confirmer" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.

(5) "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

(6) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in § 4-5-108(e) and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

(7) "Good faith" means honesty in fact in the conduct or transaction concerned.

(8) "Honor" of a letter of credit means performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, "honor" occurs (i) upon payment, (ii) if the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment, or (iii) if the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.

(9) "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.

(10) "Letter of credit" means a definite undertaking that satisfies the requirements of § 4-5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

(11) "Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit and (ii) undertakes by agreement or custom and practice to reimburse.

(12) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

(13) "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.

(14) "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "Successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.

(b) Definitions in other chapters applying to this chapter and the sections in which they appear are:

"Accept" or "acceptance" § 4-3-409

“Value” §§ 4-3-303, 4-4-211

(c) Chapter 1 of this title contains certain additional general definitions and principles of construction and interpretation applicable throughout this chapter.

History. Acts 1997, No. 1070, § 1.

4-5-103. Scope.

(a) This chapter applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this chapter does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this chapter.

(c) With the exception of this subsection, subsections (a) and (d) of this section, §§ 4-5-102(a)(9) and (10), 4-5-106(d), and 4-5-114(d), and except to the extent prohibited in §§ 4-1-102(3) and 4-5-117(d), the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this chapter.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

History. Acts 1997, No. 1070, § 1.

4-5-104. Formal requirements.

A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated (i) by a signature or (ii) in accordance with the agreement of the parties or the standard practice referred to in § 4-5-108(e).

History. Acts 1997, No. 1070, § 1.

CASE NOTES

Modifications.

In the absence of the issuing bank's signature approving a renewal permit and authorizing coverage of the obligations it established, no forfeiture may occur based

on customer's failure to meet those obligations. In re Sugarloaf Mining Co., 310 Ark. 772, 840 S.W.2d 172 (1992), supp. op., 310 Ark. 782A (1992) (decision under prior law).

4-5-105. Consideration.

Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.

History. Acts 1997, No. 1070, § 1.

4-5-106. Issuance, amendment, cancellation, and duration.

(a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.

(b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.

(c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one (1) year after its stated date of issuance or, if none is stated, after the date on which it is issued.

(d) A letter of credit that states that it is perpetual expires five (5) years after its stated date of issuance, or if none is stated, after the date on which it is issued.

(e) The provisions of subsections (c) and (d) of this section shall not apply to letters of credit issued at any time to the Workers' Compensation Commission.

History. Acts 1997, No. 1070, § 1; **Amendments.** The 1999 amendment 1999, No. 1265, § 1. added (e).

4-5-107. Confirmer, nominated person, and adviser.

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

(b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.

(c) A person requested to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.

(d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under subsection (c) of this section. The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the

letter of credit, confirmation, amendment, or advice received by the person who so notifies.

History. Acts 1997, No. 1070, § 1.

4-5-108. Issuer's rights and obligations.

(a) Except as otherwise provided in § 4-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e) of this section, appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in § 4-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:

(1) to honor,

(2) if the letter of credit provides for honor to be completed more than seven (7) business days after presentation, to accept a draft or incur a deferred obligation, or

(3) to give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d) of this section, an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) of this section or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in § 4-5-109(a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) the performance or nonperformance of the underlying contract, arrangement, or transaction,

(2) an act or omission of others, or

(3) observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e) of this section.

(g) If an undertaking constituting a letter of credit under § 4-5-102(a)(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(i) An issuer that has honored a presentation as permitted or required by this chapter:

(1) is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) takes the documents free of claims of the beneficiary or presenter;

(3) is precluded from asserting a right of recourse on a draft under §§ 4-3-414 and 4-3-415;

(4) except as otherwise provided in §§ 4-5-110 and 4-5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

History. Acts 1997, No. 1070, § 1.

4-5-109. Fraud and forgery.

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) the issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(2) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

(1) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

(2) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;

(3) all of the conditions to entitle a person to the relief under the law of this state have been met; and

(4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or

material fraud and the person demanding honor does not qualify for protection under subdivision (a)(1) of this section.

History. Acts 1997, No. 1070, § 1.

CASE NOTES

Maturity of Obligation.

The letter of credit issuer's obligation matures when a draft is presented accompanied by any required documentation. The equities among the other parties have

no bearing upon the obligation of the issuer. *Universal Sec. Ins. Co. v. Ring*, 298 Ark. 582, 769 S.W.2d 750 (1989) (decision under prior law).

4-5-110. Warranties.

(a) If its presentation is honored, the beneficiary warrants:

(1) to the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in § 4-5-109(a); and

(2) to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

(b) The warranties in subsection (a) of this section are in addition to warranties arising under chapters 3, 4, 7, and 8 because of the presentation or transfer of documents covered by any of those chapters.

History. Acts 1997, No. 1070, § 1.

4-5-111. Remedies.

(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this chapter or an issuer breaches an obligation not covered in subsection (a) or (b) of this section, a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections (a) and (b) of this section.

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b), or (c) of this section shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this chapter.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this chapter may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

History. Acts 1997, No. 1070, § 1.

CASE NOTES

Fraud in the Transaction.

Existence of a small amount of back charges on a contract did not support a finding that developer committed fraud when it stated it had been very satisfied with the work of a contractor who later defaulted; therefore, it was error to grant

permanent injunctive relief to issuer of irrevocable letter of credit and prevent the bank from honoring the draft drawn on the letter of credit. *Rose Devs., Inc. v. Pearson Properties, Inc.*, 38 Ark. App. 215, 832 S.W.2d 286 (1992) (decision under prior law).

4-5-112. Transfer of letter of credit.

(a) Except as otherwise provided in § 4-5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.

(b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:

(1) the transfer would violate applicable law; or

(2) the transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in § 4-5-108(e) or is otherwise reasonable under the circumstances.

History. Acts 1997, No. 1070, § 1.

CASE NOTES

Cited: B.E.I. Int'l, Inc. v. Thai Military Bank, 978 F.2d 440 (8th Cir. 1992) (decision under prior law).

4-5-113. Transfer by operation of law.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e) of this section, an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in § 4-5-108(e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) of this section has the consequences specified in § 4-5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of § 4-5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) of this section or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b) of this section.

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

History. Acts 1997, No. 1070, § 1.

4-5-114. Assignment of proceeds.

(a) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a

present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by chapter 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by chapter 9 or other law.

History. Acts 1997, No. 1070, § 1.

RESEARCH REFERENCES

ALR. What constitutes compliance of documents presented with terms of letter of credit so as to require honor of draft under UCC § 5-114. 8 ALR 5th 463.

Applicability of waiver of estoppel to

preclude claim of nonconformance of documents as ground for dishonor of presentment under letter of credit under UCC § 5-114. 53 ALR 5th 667.

CASE NOTES

ANALYSIS

Adversary relationship.
Fraud in the transaction.
Presentment.

Adversary Relationship.

Where the plaintiff buyers asserted that defendant sellers acted fraudulently in presenting drafts for payment, when in fact they had already been paid, there existed a truly adversary relationship between the plaintiffs and the issuing banks, because the issuing banks were free, before plaintiffs' successful application to the state court for a temporary

restraining order, to honor the drafts and demand payment from the plaintiffs on the basis of plaintiffs' promissory notes to the banks executed to induce the banks to issue the letters of credit. *W.O.A., Inc. v. City Nat'l Bank*, 640 F. Supp. 1157 (W.D. Ark. 1986) (decision under prior law).

Fraud in the Transaction.

A beneficiary who tenders a draft knowing that its certification of nonpayment by the buyers is in fact false is guilty of "fraud in the transaction" within the meaning of the exception under subdivision (2)(b) of this section so as to relieve the issuer of a letter of credit from the

duty of honoring a draft on it. *W.O.A., Inc. v. City Nat'l Bank*, 640 F. Supp. 1157 (W.D. Ark. 1986) (decision under prior law).

Presentment.

Presentment of a letter of credit is governed by the terms of the letter itself. *Unifirst Fed. Sav. Bank v. American Ins.*

Co., 905 F.2d 208 (8th Cir. 1990) (decision under prior law).

Cited: *In re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992), *supp. op.*, 310 Ark. 782A (1992) (decision under prior law).

4-5-115. Statute of limitations.

An action to enforce a right or obligation arising under this chapter must be commenced within one (1) year after the expiration date of the relevant letter of credit or one (1) year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

History. Acts 1997, No. 1070, § 1.

4-5-116. Choice of law and forum.

(a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in § 4-5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) of this section applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one (1) address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

(c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this chapter would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b) of this section, (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in § 4-5-103(c).

(d) If there is conflict between this chapter and chapter 3, 4, 4A, or 9, this chapter governs.

(e) The forum for settling disputes arising out of an undertaking within this chapter may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a) of this section.

History. Acts 1997, No. 1070, § 1.

RESEARCH REFERENCES

ALR. Validity, construction, and application of Uniform Customs and Practice for Documentary Credits (UCP). 56 ALR 5th 565.

CASE NOTES

Assignment.

In light of the evidence that the partial assignment preserved the original terms of the letter of credit, and that the letter of credit was in fact called under the terms specified in the original agreement, there was no error in finding that the right to call the letter of credit remained with bank which financed construction project, and that the assignment of an interest in

the letter of credit to another bank did not release a third bank which participated in the letter of credit from its duty to honor the letter of credit. *City Nat'l Bank v. First Nat'l Bank & Trust Co.*, 22 Ark. App. 5, 732 S.W.2d 489 (1987) (decision under prior law).

Cited: *Unifirst Fed. Sav. Bank v. American Ins. Co.*, 905 F.2d 208 (8th Cir. 1990) (decision under prior law).

4-5-117. Subrogation of issuer, applicant, and nominated person.

(a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a) of this section.

(c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:

(1) the issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(2) the beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and

(3) the applicant to same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

(d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) of this section do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) of this section do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse.

History. Acts 1997, No. 1070, § 1.

4-5-118. Security interest of issuer or nominated person.

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to chapter 9, but:

(1) a security agreement is not necessary to make the security interest enforceable under § 4-9-203(b)(3);

(2) if the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(3) if the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

History. Acts 2001, No. 1439, § 14.

4-5-119. Applicability.

This chapter applies to a letter of credit that is issued on or after August 1, 1997. This chapter does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before August 1, 1997.

History. Acts 1997, No. 1070, § 9;
2001, No. 1439, § 14.

A.C.R.C. Notes. This section was formerly codified as § 4-5-118.

4-5-120. Savings clause.

A transaction arising out of or associated with a letter of credit that was issued before August 1, 1997 and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this chapter as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law.

History. Acts 1997, No. 1070, § 10; 2001, No. 1439, § 14.

A.C.R.C. Notes. This section was formerly codified as § 4-5-119.

CHAPTER 6

BULK TRANSFERS. [REPEALED.]

SECTION.

4-6-101 — 4-6-111. [Repealed.]

A.C.R.C. Notes. Acts 1991, No. 344, § 4, provided: “Rights and obligations that arose under Chapter 6, Title 4, Arkansas Code Annotated, “BULK TRANSFERS” and 4-9-111 before the effective date of this act repealing same, remain

valid and may be enforced as though those provisions had not been repealed.”

Although the Acts 1991, No. 344 apparently was intended to repeal § 4-9-111 as well as this Chapter, the repeal of § 4-9-111 was not given effect by that act.

4-6-101 — 4-6-111. [Repealed.]

Publisher’s Notes. This chapter was repealed by Acts 1991, No. 344, § 1. The chapter was derived from the following sources:

4-6-101. Acts 1961, No. 185, § 6-101; reen. 1967, No. 303, § 19 (6-101); A.S.A. 1947, § 85-6-101.

4-6-102. Acts 1961, No. 185, § 6-102; reen. 1967, No. 303, § 19 (6-102); A.S.A. 1947, § 85-6-102.

4-6-103. Acts 1961, No. 185, § 6-103; 1967, No. 303, § 19 (6-103); A.S.A. 1947, § 85-6-103.

4-6-104. Acts 1961, No. 185, § 6-104; 1967, No. 303, § 19 (6-104); A.S.A. 1947, § 85-6-104.

4-6-105. Acts 1961, No. 185, § 6-105; reen. 1967, No. 303, § 19 (6-105); A.S.A. 1947, § 85-6-105.

4-6-106. Reserved.

4-6-107. Acts 1961, No. 185, § 6-106; 1967, No. 303, § 19 (6-107); A.S.A. 1947, § 85-6-106.

4-6-108. Acts 1961, No. 185, § 6-107; 1967, No. 303, § 19 (6-108); A.S.A. 1947, § 85-6-107.

4-6-109. Acts 1961, No. 185, § 6-108; 1967, No. 303, § 19 (6-109); A.S.A. 1947, § 85-6-108.

4-6-110. Acts 1961, No. 185, § 6-109; reen. 1967, No. 303, § 19 (6-110); A.S.A. 1947, § 85-6-109.

4-6-111. Acts 1961, No. 185, § 6-111; as added by Acts 1967, No. 303, § 19 (6-111); A.S.A. 1947, § 85-6-110.

CHAPTER 7

WAREHOUSE RECEIPTS, BILLS OF LADING, AND OTHER DOCUMENTS OF TITLE

PART.

1. GENERAL.
2. WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.
3. BILLS OF LADING: SPECIAL PROVISIONS.
4. WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS.
5. WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.
6. WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS.

RESEARCH REFERENCES

Am. Jur. 13 Am. Jur. 2d, Carriers, § 323 et seq.

15A Am. Jur. 2d, Comm. Code, § 35 et seq.

78 Am. Jur. 2d, Wareh., § 40 et seq.

Ark. L. Notes. Laurence, A Statutory Primer: Article Seven of the U.C.C. — Documents of Title, 1989 Ark. L. Notes 43.

Ark. L. Rev. Warehouse Receipts, Bills of Lading, and Other Documents of Title: Article VII, 16 Ark. L. Rev. 81.

Note, Act 401 of the Public Grain Warehouse Law: An Exception to the U.C.C. Concept of Voidable Title, 37 Ark. L. Rev. 293.

UALR L.J. Note, Storers of Grain — Arkansas Stands Alone in Protecting the Rights of Depositors of Grain in Public Warehouses, etc., 9 UALR L.J. 699.

 PART 1 — GENERAL

SECTION.

4-7-101. Short title.

4-7-102. Definitions and index of definitions.

4-7-103. Relation of article to treaty, statute, tariff, classification, or regulation.

SECTION.

4-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading, or other document of title.

4-7-105. Construction against negative implication.

Cross References. Applicability to laws governing warehousing of farm products, § 4-10-102.

 4-7-101. Short title.

This chapter shall be known and may be cited as Uniform Commercial Code — Documents of Title.

History. Acts 1961, No. 185, § 7-101; A.S.A. 1947, § 85-7-101.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

4-7-102. Definitions and index of definitions.

(1) In this chapter, unless the context otherwise requires:

(a) "Bailee" means the person who by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.

(b) "Consignee" means the person named in a bill to whom or to whose order the bill promises delivery.

(c) "Consignor" means the person named in a bill as the person from whom the goods have been received for shipment.

(d) "Delivery order" means a written order to deliver goods directed to a warehouseman, carrier, or other person who in the ordinary course of business issues warehouse receipts or bills of lading.

(e) "Document" means document of title as defined in the general definitions in chapter 1 of this title (§ 4-1-201).

(f) "Goods" means all things which are treated as movable for the purposes of a contract of storage or transportation.

(g) "Issuer" means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions.

(h) "Warehouseman" is a person engaged in the business of storing goods for hire.

(2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

"Duly negotiate". Section 4-7-501.

"Person entitled under the document". Section 4-7-403(4).

(3) Definitions in other chapters applying to this chapter and the sections in which they appear are:

"Contract for sale". Section 4-2-106.

"Overseas". Section 4-2-323.

"Receipt" of goods. Section 4-2-103.

(4) In addition chapter 1 of this title contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History. Acts 1961, No. 185, § 7-102;
A.S.A. 1947, § 85-7-102.

4-7-103. Relation of article to treaty, statute, tariff, classification, or regulation.

To the extent that any treaty or statute of the United States, regulatory statute of this state or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this chapter are subject thereto.

History. Acts 1961, No. 185, § 7-103;
A.S.A. 1947, § 85-7-103.

CASE NOTES

Regulations.

There is no conflict between regulations promulgated by the Transportation Safety Agency and the Uniform Commercial Code (subtitle 1 of this title) inasmuch as

this section provides that regulatory state statutes are controlling. *Household Goods Carriers v. Arkansas Transp. Comm'n*, 262 Ark. 797, 562 S.W.2d 42 (1978).

4-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading, or other document of title.

(1) A warehouse receipt, bill of lading, or other document of title is negotiable

(a) if by its terms the goods are to be delivered to bearer or to the order of a named person; or

(b) where recognized in overseas trade, if it runs to a named person or assigns.

(2) Any other document is non-negotiable. A bill of lading in which it is stated that the goods are cosigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

History. Acts 1961, No. 185, § 7-104; A.S.A. 1947, § 85-7-104.

gotiable bill of lading when not so marked, penalty, § 4-59-304.

Cross References. Issuance of nonne-

4-7-105. Construction against negative implication.

The omission from either part 2 (§ 4-7-201 et seq.) or part 3 (§ 4-7-301 et seq.) of this chapter of a provision corresponding to a provision made in the other part does not imply that a corresponding rule of law is not applicable.

History. Acts 1961, No. 185, § 7-105; A.S.A. 1947, § 85-7-105.

PART 2 — WAREHOUSE RECEIPTS: SPECIAL PROVISIONS

SECTION.

- 4-7-201. Who may issue a warehouse receipt — Storage under government bond.
- 4-7-202. Form of warehouse receipt — Essential terms — Optional terms.
- 4-7-203. Liability for non-receipt or misdescription.
- 4-7-204. Duty of care — Contractual lim-

SECTION.

- itation of warehouseman's liability.
- 4-7-205. Title under warehouse receipt defeated in certain cases.
- 4-7-206. Termination of storage at warehouseman's option.
- 4-7-207. Goods must be kept separate — Fungible goods.
- 4-7-208. Altered warehouse receipts.
- 4-7-209. Lien of warehouseman.

SECTION.

4-7-210. Enforcement of warehouseman's
lien.

Effective Dates. Acts 1981, No. 401, § 7: Mar. 10, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that Arkansas grain producers are experiencing severe losses due to their stored grain in public warehouses being sold or encumbered by the public grain warehousemen without their authorization, and that this act is

immediately necessary to clarify the law and grant protection to Arkansas farmers. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

4-7-201. Who may issue a warehouse receipt — Storage under government bond.

(1) A warehouse receipt may be issued by any warehouseman.

(2) Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman.

History. Acts 1961, No. 185, § 7-201;
A.S.A. 1947, § 85-7-201.

4-7-202. Form of warehouse receipt — Essential terms — Optional terms.

(1) A warehouse receipt need not be in any particular form.

(2) Unless a warehouse receipt embodies within its written or printed terms each of the following, the warehouseman is liable for damages caused by the omission to a person injured thereby:

(a) the location of the warehouse where the goods are stored;

(b) the date of issue of the receipt;

(c) the consecutive number of the receipt;

(d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;

(e) the rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a nonnegotiable receipt;

(f) a description of the goods or of the packages containing them;

(g) the signature of the warehouseman, which may be made by his authorized agent;

(h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

(i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (§ 4-7-209). If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

(3) A warehouseman may insert in his receipt any other terms which are not contrary to the provisions of this subtitle and do not impair his obligation of delivery (§ 4-7-403) or his duty of care (§ 4-7-204). Any contrary provisions shall be ineffective.

History. Acts 1961, No. 185, § 7-202;
A.S.A. 1947, § 85-7-202.

4-7-203. Liability for non-receipt or misdescription.

A party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the non-receipt or misdescription of the goods except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by "contents, condition, and quality unknown", "said to contain" or the like, if such indication be true, or the party or purchaser otherwise has notice.

History. Acts 1961, No. 185, § 7-203;
A.S.A. 1947, § 85-7-203.

Cross References. Penalty, issuance of warehouse receipt containing false statement, § 4-59-402.

Penalty, issuance of warehouse receipt when goods not in possession or control, § 4-59-401.

4-7-204. Duty of care — Contractual limitation of warehouseman's liability.

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may

be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

History. Acts 1961, No. 185, § 7-204;
A.S.A. 1947, § 85-7-204.

CASE NOTES

Exercise of Due Care.

A warehouseman is required to exercise due care or a reasonable degree of prudence for the protection and preservation of goods stored with him and is liable for a

loss or injury for a failure to exercise such care. *United States Borax & Chem. Co. v. Blackhawk Warehousing & Leasing Co.*, 266 Ark. 831, 586 S.W.2d 248 (1979).

4-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in the ordinary course of business of fungible goods, except the grains listed below, sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated. This section shall not apply to rice, soybeans, wheat, corn, rye, oats, barley, flaxseed, sorghum, mixed grain, nor other food grains or oilseeds.

History. Acts 1961, No. 185, § 7-205;
1981, No. 401, § 3; A.S.A. 1947, § 85-7-205.

RESEARCH REFERENCES

Ark. L. Notes. Pedersen, *Crop Financing: A Guide to Arkansas Law*, 1988 Ark. L. Notes 31.

UALR L.J. *Legislative Survey, Business Law*, 4 UALR L.J. 579.

CASE NOTES

Cited: *Farm Bureau Mut. Ins. Co. v. Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985); *Farmers Rice Milling Co. v.*

Hawkins (In re Bearhouse, Inc.), 84 Bankr. 552 (Bankr. W.D. Ark. 1988).

4-7-206. Termination of storage at warehouseman's option.

(1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods

from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty (30) days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien (§ 4-7-210).

(2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in subsection (1) for notification, advertisement and sale, the warehouseman may specify in the notification any reasonable shorter time for removal of the goods and in case the goods are not removed may sell them at public sale held not less than one (1) week after a single advertisement or posting.

(3) If as a result of a quality or condition of the goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman after a reasonable effort is unable to sell the goods he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.

(4) The warehouseman must deliver the goods to any person entitled to them under this chapter upon due demand made at any time prior to sale or other disposition under this section.

(5) The warehouseman may satisfy his lien from the proceeds of any sale or disposition under this section but must hold the balance for delivery on the demand of any person to whom he would have been bound to deliver the goods.

History. Acts 1961, No. 185, § 7-206;
A.S.A. 1947, § 85-7-206.

4-7-207. Goods must be kept separate — Fungible goods.

(1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

History. Acts 1961, No. 185, § 7-207;
A.S.A. 1947, § 85-7-207.

CASE NOTES

In General.

This section establishes ownership priorities in fungible goods where the claims of ownership exceed the amount of available goods. It clearly states that all owners of commingled fungible goods are ten-

ants in common and share pro rata in any distribution of grain when there is a shortage. *Farmers Rice Milling Co. v. Hawkins* (In re Bearhouse, Inc.), 84 Bankr. 552 (Bankr. W.D. Ark. 1988).

4-7-208. Altered warehouse receipts.

Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor.

History. Acts 1961, No. 185, § 7-208;
A.S.A. 1947, § 85-7-208.

4-7-209. Lien of warehouseman.

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the chapter on secured transactions (chapter 9 of this title).

(3)(a) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under § 4-7-503.

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings, and personal effects used by the depositor in a dwelling.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

History. Acts 1961, No. 185, § 7-209; 1967, No. 303, § 20; A.S.A. 1947, § 85-7-209.

RESEARCH REFERENCES

Ark. L. Notes. Pedersen, Crop Financing: A Guide to Arkansas Law, 1988 Ark. L. Notes 31.

Ark. L. Rev. Creditors' Provisional Remedies and Debtors' Due Process

Rights: Statutory Liens In Arkansas, 32 Ark. L. Rev. 185.

UALR L.J. Maltz, State Action and Statutory Liens in Arkansas — A Reply to Professor Nickles, 2 UALR L.J. 357.

4-7-210. Enforcement of warehouseman's lien.

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment with a specified time not less than ten (10) days after receipt of the notification, and a conspicuous statement that unless the claim is paid

within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two (2) weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen (15) days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten (10) days before the sale in not less than six (6) conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this chapter.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

History. Acts 1961, No. 185, § 7-210; A.S.A. 1947, § 85-7-210.

Cross References. Certified mail in lieu of registered mail, § 4-1-102.

RESEARCH REFERENCES

Ark. L. Rev. Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens In Arkansas, 32 Ark. L. Rev. 185.

UALR L.J. Maltz, State Action and Statutory Liens in Arkansas — A Reply to Professor Nickles, 2 UALR L.J. 357.

PART 3 — BILLS OF LADING: SPECIAL PROVISIONS

SECTION.

- 4-7-301. Liability for non-receipt or misdescription — “Said to contain” — “Shipper’s load and count” — Improper handling.
- 4-7-302. Through bills of lading and similar documents.
- 4-7-303. Diversion — Reconsignment — Change of instructions.

SECTION.

- 4-7-304. Bills of lading in a set.
- 4-7-305. Destination bills.
- 4-7-306. Altered bills of lading.
- 4-7-307. Lien of carrier.
- 4-7-308. Enforcement of carrier’s lien.
- 4-7-309. Duty of care — Contractual limitation of carrier’s liability.

4-7-301. Liability for non-receipt or misdescription — “Said to contain” — “Shipper’s load and count” — Improper handling.

(1) A consignee of a non-negotiable bill who has been given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in either case upon the description therein of the goods, or upon the date therein shown, may recover from the issuer damages caused by the misdating of the bill or the non-receipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by “contents or condition of contents of packages unknown”, “said to contain”, “shipper’s weight, load and count” or the like, if such indication be true.

(2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases “shipper’s weight, load and count” or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.

(3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases “shipper’s weight” or other words of like purport are ineffective.

(4) The issuer may by inserting in the bill the words “shipper’s weight, load and count” or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

(5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and

the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

History. Acts 1961, No. 185, § 7-301; 1967, No. 303, § 21; A.S.A. 1947, § 85-7-301.

Cross References. Penalty, inducing carrier to issue bill when goods not in possession, § 4-59-305.

Penalty, issuance of bill containing false statement, § 4-59-302.

Penalty, issuance of bill when goods not received, § 4-59-301.

4-7-302. Through bills of lading and similar documents.

(1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.

(2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document and does not include liability for breach by any other such persons or by the issuer.

(3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefor.

History. Acts 1961, No. 185, § 7-302; A.S.A. 1947, § 85-7-302.

4-7-303. Diversion — Reconsignment — Change of instructions.

(1) Unless the bill of lading otherwise provides, the carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from:

(a) the holder of a negotiable bill; or

(b) the consignor on a non-negotiable bill notwithstanding contrary instructions from the consignee; or

(c) the consignee on a non-negotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or

(d) the consignee on a non-negotiable bill if he is entitled as against the consignor to dispose of them.

(2) Unless such instructions are noted on a negotiable bill of lading, a person to whom the bill is duly negotiated can hold the bailee according to the original terms.

History. Acts 1961, No. 185, § 7-303;
A.S.A. 1947, § 85-7-303.

4-7-304. Bills of lading in a set.

(1) Except where customary in overseas transportation, a bill of lading must not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(2) Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitutes one (1) bill.

(3) Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrender of his part.

(4) Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.

(5) The bailee is obliged to deliver in accordance with part 4 of this chapter (§ 4-7-401 et seq.) against the first presented part of a bill of lading lawfully drawn in a set. Such delivery discharges the bailee's obligation on the whole bill.

History. Acts 1961, No. 185, § 7-304;
A.S.A. 1947, § 85-7-304.

4-7-305. Destination bills.

(1) Instead of issuing a bill of lading to the consignor at the place of shipment a carrier may at the request of the consignor procure the bill to be issued at destination or at any other place designated in the request.

(2) Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request.

History. Acts 1961, No. 185, § 7-305;
A.S.A. 1947, § 85-7-305.

4-7-306. Altered bills of lading.

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

History. Acts 1961, No. 185, § 7-306;
A.S.A. 1947, § 85-7-306.

4-7-307. Lien of carrier.

(1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.

(2) A lien for charges and expenses under subsection (1) on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under subsection (1) is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

(3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

History. Acts 1961, No. 185, § 7-307;
A.S.A. 1947, § 85-7-307.

RESEARCH REFERENCES

Ark. L. Rev. Creditors' Provisional Rights: Statutory Liens In Arkansas, 32 Remedies and Debtors' Due Process Ark. L. Rev. 185.

CASE NOTES

ANALYSIS

Goods transported for prior debt.
Lien not shown.

Goods Transported for Prior Debt.

A lien on presently transported goods for a prior debt is not contemplated under the Uniform Commercial Code. Car

Transp. v. Garden Spot Distribs., 305 Ark. 82, 805 S.W.2d 632 (1991).

Lien Not Shown.

Appellants had not established that they had acquired a valid carrier's lien because they had refused to surrender possession of the two trucks, had placed the trucks in secret storage, and had insisted upon payment of charges over and

above those to which they would have been entitled, by demanding payment of all three invoices, despite the fact that only one of the invoices pertained to the

transportation fees for the two trucks at issue. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998).

4-7-308. Enforcement of carrier's lien.

(1) A carrier's lien may be enforced by public or private sale of the goods, in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the carrier subject to the terms of the bill and this chapter.

(3) The carrier may buy at any public sale pursuant to this section.

(4) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the carrier with the requirements of this section.

(5) The carrier may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(6) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(7) A carrier's lien may be enforced in accordance with either subsection (1) or the procedure set forth in subsection (2) of § 4-7-210.

(8) The carrier is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

History. Acts 1961, No. 185, § 7-308; 1967, No. 303, § 22; A.S.A. 1947, § 85-7-308.

4-7-309. Duty of care — Contractual limitation of carrier’s liability.

(1) A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.

(2) Damages may be limited by a provision that the carrier’s liability shall not exceed a value stated in the document if the carrier’s rates are dependent upon value and the consignor by the carrier’s tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier’s liability for conversion to its own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff.

History. Acts 1961, No. 185, § 7-309;
A.S.A. 1947, § 85-7-309.

PART 4 — WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS

SECTION.	SECTION.
4-7-401. Irregularities in issue of receipt or bill or conduct of issuer.	carrier to deliver — Ex- cuse.
4-7-402. Duplicate receipt or bill — Over- issue.	4-7-404. No liability for good faith deliv- ery pursuant to receipt or bill.
4-7-403. Obligation of warehouseman or	

4-7-401. Irregularities in issue of receipt or bill or conduct of issuer.

The obligations imposed by this chapter on an issuer apply to a document of title regardless of the fact that

- (a) the document may not comply with the requirements of this chapter or of any other law or regulation regarding its issue, form, or content; or
- (b) the issuer may have violated laws regulating the conduct of his business; or
- (c) the goods covered by the document were owned by the bailee at the time the document was issued; or
- (d) the person issuing the document does not come within the definition of warehouseman if it purports to be a warehouse receipt.

History. Acts 1961, No. 185, § 7-401; of warehouse receipt covering goods of
A.S.A. 1947, § 85-7-401. which warehouseman is owner, § 4-59-
Cross References. Penalty, issuance 404.

4-7-402. Duplicate receipt or bill — Overissue.

Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.

History. Acts 1961, No. 185, § 7-402; A.S.A. 1947, § 85-7-402.

Penalty, issuance of duplicate warehouse receipt when not so marked, § 4-

Cross References. Penalty, issuance of duplicate bill of lading when not so marked, § 4-59-303.

4-7-403. Obligation of warehouseman or carrier to deliver — Excuse.

(1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable, provided the burden of establishing negligence in such cases is on the person entitled under the document;

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the chapter on sales (§ 4-2-705);

(e) a diversion, reconsignment, or other disposition pursuant to the provisions of this chapter (§ 4-7-303) or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defense against the claimant;

(g) any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under § 4-7-503(1), he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document.

History. Acts 1961, No. 185, § 7-403; 1967, No. 303, § 23; A.S.A. 1947, § 85-7-403.

Cross References. Penalty, delivery of goods without obtaining receipt, § 4-59-405.

CASE NOTES

Cited: Farmers Rice Milling Co. v. Hawkins (In re Bearhouse, Inc.), 84 Bankr. 552 (Bankr. W.D. Ark. 1988).

4-7-404. No liability for good faith delivery pursuant to receipt or bill.

A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to this chapter is not liable therefor. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them.

History. Acts 1961, No. 185, § 7-404; A.S.A. 1947, § 85-7-404.

PART 5 — WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER

SECTION.

- 4-7-501. Form of negotiation and requirements of "due negotiation."
- 4-7-502. Rights acquired by due negotiation.
- 4-7-503. Document of title to goods defeated in certain cases.
- 4-7-504. Rights acquired in the absence of due negotiation — Effect of diversion — Seller's stoppage of delivery.
- 4-7-505. Indorser not a guarantor for other parties.

SECTION.

- 4-7-506. Delivery without indorsement — Right to compel indorsement.
- 4-7-507. Warranties on negotiation or transfer of receipt or bill.
- 4-7-508. Warranties of collecting bank as to documents.
- 4-7-509. Receipt or bill — When adequate compliance with commercial contract.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting

case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective

date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9

become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

Ark. L. Notes. Pedersen, Crop Financing: A Guide to Arkansas Law, 1988 Ark. L. Notes 31.

4-7-501. Form of negotiation and requirements of "due negotiation."

(1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.

(2)(a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.

(b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.

(4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

(5) Indorsement of a non-negotiable document neither makes it negotiable nor adds to the transferee's rights.

(6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

History. Acts 1961, No. 185, § 7-501; 1967, No. 303, § 24; A.S.A. 1947, § 85-7-501.

4-7-502. Rights acquired by due negotiation.

(1) Subject to the following section and to the provisions of § 4-7-205

on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:

- (a) title to the document;
- (b) title to the goods;
- (c) all rights accruing under the law of agency or estoppel including rights to goods delivered to the bailee after the document was issued; and
- (d) the direct obligations of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this chapter. In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(2) Subject to the following section, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

History. Acts 1961, No. 185, § 7-502; 1967, No. 303, § 25; A.S.A. 1947, § 85-7-502.

Cross References. Negotiation of bill when not in carrier's possession, penalty, § 4-59-307.

CASE NOTES

Transfer of Title.

Subdivision (1) of this section states that a holder to whom a negotiable document of title has been duly negotiated acquires title to the document and title to the goods. Title to the goods is also trans-

ferred when the negotiable warehouse receipt is negotiated to a holder as collateral for a loan. *Farmers Rice Milling Co. v. Hawkins* (In re Bearhouse, Inc.), 84 Bankr. 552 (Bankr. W.D. Ark. 1988).

4-7-503. Document of title to goods defeated in certain cases.

(1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither:

(a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this chapter (§ 4-7-403) or with power of disposition under this subtitle (§§ 4-2-403 and 4-9-320) or other statute or rule of law; nor

(b) acquiesced in the procurement by the bailor or his nominee of any document of title.

(2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section to the same extent as the rights of the issuer or a transferee from the issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with part 4 of this chapter, § 4-7-401 et seq., pursuant to its own bill of lading discharges the carrier's obligation to deliver.

History. Acts 1961, No. 185, § 7-503; A.S.A. 1947, § 85-7-503; Acts 2001, No. 1439, § 15.

Amendments. The 2001 amendment substituted "4-9-320" for "4-9-307" in (1)(a); and made minor stylistic changes in (1)(b).

Cross References. Negotiation of bill of lading for mortgaged goods, penalty, § 4-59-306.

Negotiation of warehouse receipt covering encumbered property, penalty, § 4-59-406.

4-7-504. Rights acquired in the absence of due negotiation — Effect of diversion — Seller's stoppage of delivery.

(1) A transferee of a document, whether negotiable or non-negotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.

(2) In the case of a non-negotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated:

(a) by those creditors of the transferor who could treat the sale as void under § 4-2-402; or

(b) by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or

(c) as against the bailee by good faith dealings of the bailee with the transferor.

(3) A diversion or other change of shipping instructions by the consignor in a non-negotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.

(4) Delivery pursuant to a non-negotiable document may be stopped by a seller under § 4-2-705, and subject to the requirement of due notification there provided. A bailee honoring the seller's instructions is entitled to be indemnified by the seller against any resulting loss or expense.

History. Acts 1961, No. 185, § 7-504; A.S.A. 1947, § 85-7-504.

CASE NOTES

Non-negotiable Documents.

Where, under this section and the agreement of the parties, an important and significant part of the debtor's right, title, and interest in the property passed to the bank as holder of non-negotiable

warehouse receipts for property of debtor, the bank had a substantial adverse claim to title of the property, as opposed to debtor or to other creditors. *Nytco Servs., Inc. v. Hurley's Grain Elevator Co.*, 422 F. Supp. 114 (W.D. Tenn. 1976).

4-7-505. Indorser not a guarantor for other parties.

The indorsement of a document of title issued by a bailee does not make the indorser liable for any default by the bailee or by previous indorsers.

History. Acts 1961, No. 185, § 7-505;
A.S.A. 1947, § 85-7-505.

4-7-506. Delivery without indorsement — Right to compel indorsement.

The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement but the transfer becomes a negotiation only as of the time the indorsement is supplied.

History. Acts 1961, No. 185, § 7-506;
A.S.A. 1947, § 85-7-506.

4-7-507. Warranties on negotiation or transfer of receipt or bill.

Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods

- (a) that the document is genuine; and
- (b) that he has no knowledge of any fact which would impair its validity or worth; and
- (c) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

History. Acts 1961, No. 185, § 7-507;
A.S.A. 1947, § 85-7-507.

4-7-508. Warranties of collecting bank as to documents.

A collecting bank or other intermediary known to be entrusted with documents on behalf of another or with collection of a draft or other claim against delivery of documents warrants by such delivery of the documents only its own good faith and authority. This rule applies even though the intermediary has purchased or made advances against the claim or draft to be collected.

History. Acts 1961, No. 185, § 7-508;
A.S.A. 1947, § 85-7-508.

4-7-509. Receipt or bill — When adequate compliance with commercial contract.

The question whether a document is adequate to fulfill the obligations of a contract for sale or the conditions of a credit is governed by the chapters on sales (chapter 2 of this title) and on letters of credit (chapter 5 of this title).

History. Acts 1961, No. 185, § 7-509;
A.S.A. 1947, § 85-7-509.

PART 6 — WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS

SECTION.

4-7-601. Lost and missing documents.

4-7-602. Attachment of goods covered by
a negotiable document.

SECTION.

4-7-603. Conflicting claims — Inter-
pleader.

4-7-601. Lost and missing documents.

(1) If a document has been lost, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of non-surrender of the document. If the document was not negotiable, such security may be required at the discretion of the court. The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees.

(2) A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion. Delivery in good faith is not conversion if made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery who files a notice of claim within one (1) year after the delivery.

History. Acts 1961, No. 185, § 7-601;
A.S.A. 1947, § 85-7-601.

4-7-602. Attachment of goods covered by a negotiable document.

Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for

which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

History. Acts 1961, No. 185, § 7-602;
A.S.A. 1947, § 85-7-602.

4-7-603. Conflicting claims — Interpleader.

If more than one (1) person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for non-delivery of the goods, or by original action, whichever is appropriate.

History. Acts 1961, No. 185, § 7-603;
A.S.A. 1947, § 85-7-603.

CHAPTER 8

INVESTMENT SECURITIES

- PART.
- 1. SHORT TITLE AND GENERAL MATTERS.
 - 2. ISSUE AND ISSUER.
 - 3. TRANSFER OF CERTIFICATED AND UNCERTIFICATED SECURITIES.
 - 4. REGISTRATION.
 - 5. SECURITY ENTITLEMENTS.
 - 6. APPLICABILITY.

A.C.R.C. Notes. References to “this chapter” in subchapters 1-5 may not apply to subchapter 6 which was enacted subsequently.

RESEARCH REFERENCES

- ALR.** What is a “security” under UCC Art. 8. 11 ALR 4th 1036.

Am. Jur. 15A Am. Jur. 2d, Comm. Code, § 69 et seq.

Ark. L. Rev. Investment Securities: Article VIII, 16 Ark. L. Rev. 98.

UALR L.J. Legislative Survey, Uni-
- form Commercial Code, 8 UALR L.J. 609.

Martin, An Arkansas Practitioner’s Guide to Perfecting Security Interests in Securities, Brokerage Accounts, and Other Forms of Investment Property under Revised Article 8 and Amended Article 9, 19 UALR L.J. 1.

PART 1 — SHORT TITLE AND GENERAL MATTERS

- SECTION.

4-8-101. Short title.
- SECTION.

4-8-102. Definitions.

SECTION.

- 4-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.
- 4-8-104. Acquisition of security or financial asset or interest therein.
- 4-8-105. Notice of adverse claim.
- 4-8-106. Control.
- 4-8-107. Whether indorsement, instruction, or entitlement order is effective.
- 4-8-108. Warranties in direct holding.

SECTION.

- 4-8-109. Warranties in indirect holding.
- 4-8-110. Applicability — Choice of law.
- 4-8-111. Clearing corporation rules.
- 4-8-112. Creditor's legal process.
- 4-8-113. Statute of frauds inapplicable.
- 4-8-114. Evidentiary rules concerning certificated securities.
- 4-8-115. Securities intermediary and others not liable to adverse claimant.
- 4-8-116. Securities intermediary as purchaser for value.

Publisher's Notes. Former subchapter 1, concerning the short title and general matters, was repealed by Acts 1995, No. 425, § 1. The former subchapter was derived from the following sources:

4-8-101. Acts 1949, No. 472 [Part 1], § 11; 1965, No. 183, § 5; A.S.A. 1947, § 82-1901.

4-8-102. Acts 1949, No. 472 [Part 1], § 1; 1961, No. 120, §§ 1, 2; 1975, No. 743, §§ 2, 3; A.S.A. 1947, § 82-1902; Acts 1993, No. 163, § 9; 1993, No. 165, § 9.

4-8-103. Acts 1949, No. 472, [Part 1], § 9; 1973, No. 262, § 10; 1975, No. 743, § 8; 1983, No. 733, § 1; A.S.A. 1947, § 82-1909; Acts 1987, No. 529, § 1; 1991, No. 884, § 1; 1991, No. 1057, §§ 3, 5; 1993, No. 163, § 10; 1993, No. 165, § 10; 1993, No. 454, § 2; 1993, No. 461, § 2; 1993, No. 731, § 3.

4-8-104. Acts 1949, No. 472 [Part 1], § 2; 1953, No. 232, § 1; 1959, No. 211, § 1; 1965, No. 183, § 2; 1985, No. 930, § 1; A.S.A. 1947, § 82-1903; Acts 1991, No. 744, § 1.

4-8-105. Acts 1949 [Part 1], No. 472, § 2; 1963, No. 503, § 1; 1973, No. 262, § 2; A.S.A. 1947, § 82-1903; Acts 1991, No. 744, § 2.

4-8-106. Acts 1949 [Part 1], No. 472, § 2; 1963, No. 503, § 1; 1965, No. 183, § 3; 1973, No. 262, § 3; A.S.A. 1947, § 82-1903; Acts 1991, No. 744, § 3.

4-8-107. Acts 1991, No. 516, § 4.

4-8-108. Acts 1961, No. 185, § 8-108, as added by Acts 1985, No. 514, § 3; A.S.A. 1947, No. 85-8-108.

For Comments regarding the Uniform

Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

4-8-101. Short title.

This chapter may be cited as Uniform Commercial Code — Investment Securities.

History. Acts 1995, No. 425, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

4-8-102. Definitions.

(a) In this chapter:

(1) “Adverse claim” means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.

(2) “Bearer form,” as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.

(3) “Broker” means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.

(4) “Certificated security” means a security that is represented by a certificate.

(5) “Clearing corporation” means:

(i) a person that is registered as a “clearing agency” under the federal securities laws;

(ii) a federal reserve bank; or

(iii) any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.

(6) “Communicate” means to:

(i) send a signed writing; or

(ii) transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.

(7) “Entitlement holder” means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of § 4-8-501(b)(2) or (3), that person is the entitlement holder.

(8) “Entitlement order” means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.

(9) “Financial asset,” except as otherwise provided in § 4-8-103, means:

- (i) a security;
- (ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or
- (iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this chapter.

As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

(10) "Good faith," for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this chapter, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(11) "Indorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.

(12) "Instruction" means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.

(13) "Registered form," as applied to a certificated security, means a form in which:

- (i) the security certificate specifies a person entitled to the security; and
- (ii) a transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.

(14) "Securities intermediary" means:

- (i) a clearing corporation; or
- (ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

(15) "Security," except as otherwise provided in § 4-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

- (i) which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;
- (ii) which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

- (iii) which:
- (A) is, or is of a type, dealt in or traded on securities exchanges or securities markets; or
- (B) is a medium for investment and by its terms expressly provides that it is a security governed by this chapter.
- (16) "Security certificate" means a certificate representing a security.
- (17) "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in part 5 (§ 4-8-501 et seq.).
- (18) "Uncertificated security" means a security that is not represented by a certificate.
- (b) Other definitions applying to this chapter and the sections in which they appear are:
- | | |
|-----------------------------|-----------|
| Appropriate person | § 4-8-107 |
| Control | § 4-8-106 |
| Delivery | § 4-8-301 |
| Investment company security | § 4-8-103 |
| Issuer | § 4-8-201 |
| Overissue | § 4-8-210 |
| Protected purchaser | § 4-8-303 |
| Securities account | § 4-8-501 |
- (c) In addition, chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.
- (d) The characterization of a person, business, or transaction for purposes of this chapter does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule.

History. Acts 1995, No. 425, § 1.

RESEARCH REFERENCES

UALR L.J. Martin, An Arkansas Practitioner's Guide to Perfecting Security Interests in Securities, Brokerage Accounts, and Other Forms of Investment Property under Revised Article 8 and Amended Article 9, 19 UALR L.J. 1.

CASE NOTES

Securities.

Where a delivery debenture issued to the debtors by a cooperative and later delivered to a credit association as security for a debt owed by the debtors to the credit association conferred rights upon its holder, was in registered form, was one of a series of documents issued by the cooperative, evidenced an obligation of the issuer, was recognized in the area as a medium for investment, and was assign-

able, the delivery debenture was held to be a "security". Davidson v. Arkansas River Valley Grain Drying Coop., 692 F.2d 55 (8th Cir. 1982) (decision prior to 1985 amendment).

The fact that stock issuer did not physically deliver the stock certificate to lender did not prevent the stock from being a "security." J.M. Prods., Inc. v. Arkansas Capital Corp., 51 Ark. App. 85, 910 S.W.2d 702 (1995).

4-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this chapter, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this chapter and not by chapter 3, even though it also meets the requirements of that chapter. However, a negotiable instrument governed by chapter 3 is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in § 4-9-102(a)(15), is not a security or a financial asset.

History. Acts 1995, No. 425, § 1; 2001, substituted "§ 4-9-102(a)(15)" for "§ 4-9-115" in (f).

Amendments. The 2001 amendment

4-8-104. Acquisition of security or financial asset or interest therein.

(a) A person acquires a security or an interest therein, under this chapter, if:

(1) the person is a purchaser to whom a security is delivered pursuant to § 4-8-301; or

(2) the person acquires a security entitlement to the security pursuant to § 4-8-501.

(b) A person acquires a financial asset, other than a security, or an interest therein, under this chapter, if the person acquires a security entitlement to the financial asset.

(c) A person who acquires a security entitlement to a security or other financial asset has the rights specified in subchapter 5, but is a purchaser of any security, security entitlement, or other financial asset held by the securities intermediary only to the extent provided in § 4-8-503.

(d) Unless the context shows that a different meaning is intended, a person who is required by other law, regulation, rule, or agreement to transfer, deliver, present, surrender, exchange, or otherwise put in the possession of another person a security or financial asset satisfies that requirement by causing the other person to acquire an interest in the security or financial asset pursuant to subsection (a) or (b).

History. Acts 1995, No. 425, § 1.

4-8-105. Notice of adverse claim.

(a) A person has notice of an adverse claim if:

(1) the person knows of the adverse claim;
(2) the person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or

(3) the person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.

(b) Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

(1) one (1) year after a date set for presentment or surrender for redemption or exchange; or

(2) six (6) months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.

(d) A purchaser of a certificated security has notice of an adverse claim if the security certificate:

(1) whether in bearer or registered form, has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or

(2) is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

(e) Filing of a financing statement under chapter 9 of this title is not notice of an adverse claim to a financial asset.

History. Acts 1995, No. 425, § 1.

4-8-106. Control.

(a) A purchaser has “control” of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has “control” of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) the certificate is indorsed to the purchaser or in blank by an effective indorsement; or

(2) the certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has “control” of an uncertificated security if:

(1) the uncertificated security is delivered to the purchaser; or

(2) the issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

(d) A purchaser has “control” of a security entitlement if:

(1) the purchaser becomes the entitlement holder;

(2) the securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

(3) another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder’s own securities intermediary, the securities intermediary has control.

(f) A purchaser who has satisfied the requirements of subsection (c)(2) or (d)(2) has control, even if the registered owner in the case of subsection (c)(2) or the entitlement holder in the case of subsection (d)(2) retains the right to make substitutions for the uncertificated security or security entitlement, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.

(g) An issuer or a securities intermediary may not enter into an agreement of the kind described in subsection (c)(2) or (d)(2) without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder.

History. Acts 1995, No. 425, § 1; 2001, No. 1439, § 17.

Amendments. The 2001 amendment

added (d)(3); in (f), inserted “(2)” following “(c)” and inserted “(2)” following “(d)” throughout.

4-8-107. Whether indorsement, instruction, or entitlement order is effective.

(a) "Appropriate person" means:

(1) with respect to an indorsement, the person specified by a security certificate or by an effective special indorsement to be entitled to the security;

(2) with respect to an instruction, the registered owner of an uncertificated security;

(3) with respect to an entitlement order, the entitlement holder;

(4) if the person designated in subdivision (1), (2), or (3) is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent; or

(5) if the person designated in subdivision (1), (2), or (3) lacks capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.

(b) An indorsement, instruction, or entitlement order is effective if:

(1) it is made by the appropriate person;

(2) it is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under § 4-8-106(c)(2) or (d)(2); or

(3) the appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

(c) An indorsement, instruction, or entitlement order made by a representative is effective even if:

(1) the representative has failed to comply with a controlling instrument or with the law of the State having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction; or

(2) the representative's action in making the indorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.

(d) If a security is registered in the name of or specially indorsed to a person described as a representative, or if a securities account is maintained in the name of a person described as a representative, an indorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

(e) Effectiveness of an indorsement, instruction, or entitlement order is determined as of the date the indorsement, instruction, or entitlement order is made, and an indorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances.

4-8-108. Warranties in direct holding.

(a) A person who transfers a certificated security to a purchaser for value warrants to the purchaser, and an indorser, if the transfer is by indorsement, warrants to any subsequent purchaser, that:

- (1) the certificate is genuine and has not been materially altered;
- (2) the transferor or indorser does not know of any fact that might impair the validity of the security;
- (3) there is no adverse claim to the security;
- (4) the transfer does not violate any restriction on transfer;
- (5) if the transfer is by indorsement, the indorsement is made by an appropriate person, or if the indorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person; and
- (6) the transfer is otherwise effective and rightful.

(b) A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser that:

- (1) the instruction is made by an appropriate person, or if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person;
- (2) the security is valid;
- (3) there is no adverse claim to the security; and
- (4) at the time the instruction is presented to the issuer:
 - (i) the purchaser will be entitled to the registration of transfer;
 - (ii) the transfer will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction;
 - (iii) the transfer will not violate any restriction on transfer; and
 - (iv) the requested transfer will otherwise be effective and rightful.

(c) A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants that:

- (1) the uncertificated security is valid;
- (2) there is no adverse claim to the security;
- (3) the transfer does not violate any restriction on transfer; and
- (4) the transfer is otherwise effective and rightful.

(d) A person who indorses a security certificate warrants to the issuer that:

- (1) there is no adverse claim to the security; and
- (2) the indorsement is effective.

(e) A person who originates an instruction for registration of transfer of an uncertificated security warrants to the issuer that:

- (1) the instruction is effective; and
- (2) at the time the instruction is presented to the issuer the purchaser will be entitled to the registration of transfer.

(f) A person who presents a certificated security for registration of transfer or for payment or exchange warrants to the issuer that the

person is entitled to the registration, payment, or exchange, but a purchaser for value and without notice of adverse claims to whom transfer is registered warrants only that the person has no knowledge of any unauthorized signature in a necessary indorsement.

(g) If a person acts as agent of another in delivering a certificated security to a purchaser, the identity of the principal was known to the person to whom the certificate was delivered, and the certificate delivered by the agent was received by the agent from the principal or received by the agent from another person at the direction of the principal, the person delivering the security certificate warrants only that the delivering person has authority to act for the principal and does not know of any adverse claim to the certificated security.

(h) A secured party who redelivers a security certificate received, or after payment and on order of the debtor delivers the security certificate to another person, makes only the warranties of an agent under subsection (g).

(i) Except as otherwise provided in subsection (g), a broker acting for a customer makes to the issuer and a purchaser the warranties provided in subsections (a) through (f). A broker that delivers a security certificate to its customer, or causes its customer to be registered as the owner of an uncertificated security, makes to the customer the warranties provided in subsection (a) or (b), and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of the customer.

History. Acts 1995, No. 425, § 1.

4-8-109. Warranties in indirect holding.

(a) A person who originates an entitlement order to a securities intermediary warrants to the securities intermediary that:

(1) the entitlement order is made by an appropriate person, or if the entitlement order is by an agent, the agent has actual authority to act on behalf of the appropriate person; and

(2) there is no adverse claim to the security entitlement.

(b) A person who delivers a security certificate to a securities intermediary for credit to a securities account or originates an instruction with respect to an uncertificated security directing that the uncertificated security be credited to a securities account makes to the securities intermediary the warranties specified in § 4-8-108(a) or (b).

(c) If a securities intermediary delivers a security certificate to its entitlement holder or causes its entitlement holder to be registered as the owner of an uncertificated security, the securities intermediary makes to the entitlement holder the warranties specified in § 4-8-108(a) or (b).

History. Acts 1995, No. 425, § 1.

4-8-110. Applicability — Choice of law.

(a) The local law of the issuer's jurisdiction, as specified in subsection (d), governs:

- (1) the validity of a security;
- (2) the rights and duties of the issuer with respect to registration of transfer;
- (3) the effectiveness of registration of transfer by the issuer;
- (4) whether the issuer owes any duties to an adverse claimant to a security; and
- (5) whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

(b) The local law of the securities intermediary's jurisdiction, as specified in subsection (e), governs:

- (1) acquisition of a security entitlement from the securities intermediary;
- (2) the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;
- (3) whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and
- (4) whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

(c) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.

(d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this state may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2)-(5).

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for purposes of the Uniform Commercial Code, that jurisdiction is the securities intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the securities intermediary and its entitlement

holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If none of the preceding paragraphs apply, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of the preceding paragraphs apply, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other record keeping concerning the account.

History. Acts 1995, No. 425, § 1; 2001, No. 1439, § 18.

Amendments. The 2001 amendment rewrote (e).

4-8-111. Clearing corporation rules.

A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this subtitle and affects another party who does not consent to the rule.

History. Acts 1995, No. 425, § 1.

4-8-112. Creditor's legal process.

(a) The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (d). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

(b) The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection (d).

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d).

(d) The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.

(e) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

History. Acts 1995, No. 425, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Laurence, Some Practical Advice on How to Create a Security Interest in a Deposit Account, 1997 Ark. L. Notes 39.

4-8-113. Statute of frauds inapplicable.

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one (1) year of its making.

History. Acts 1995, No. 425, § 1.

4-8-114. Evidentiary rules concerning certificated securities.

The following rules apply in an action on a certificated security against the issuer:

(1) Unless specifically denied in the pleadings, each signature on a security certificate or in a necessary indorsement is admitted.

(2) If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.

(3) If signatures on a security certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security.

(4) If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted.

History. Acts 1995, No. 425, § 1.

4-8-115. Securities intermediary and others not liable to adverse claimant.

A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a person having an adverse claim

to the financial asset, unless the securities intermediary, or broker or other agent or bailee:

(1) took the action after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(2) acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or

(3) in the case of a security certificate that has been stolen, acted with notice of the adverse claim.

History. Acts 1995, No. 425, § 1.

4-8-116. Securities intermediary as purchaser for value.

A securities intermediary that receives a financial asset and establishes a security entitlement to the financial asset in favor of an entitlement holder is a purchaser for value of the financial asset. A securities intermediary that acquires a security entitlement to a financial asset from another securities intermediary acquires the security entitlement for value if the securities intermediary acquiring the security entitlement establishes a security entitlement to the financial asset in favor of an entitlement holder.

History. Acts 1995, No. 425, § 1.

PART 2 — ISSUE AND ISSUER

SECTION.

4-8-201. Issuer.

4-8-202. Issuer's responsibility and defenses — Notice of defect or defense.

4-8-203. Staleness as notice of defect or defense.

4-8-204. Effect of issuer's restriction on transfer.

4-8-205. Effect of unauthorized signature on security certificate.

SECTION.

4-8-206. Completion or alteration of security certificate.

4-8-207. Rights and duties of issuer with respect to registered owners.

4-8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.

4-8-209. Issuer's lien.

4-8-210. Overissue.

Publisher's Notes. Former part 2, concerning issue and issuer, was repealed by Acts 1995, No. 425, § 1. The former part was derived from the following sources:

4-8-201. Acts 1961, No. 185, § 8-201; 1985, No. 514, § 3 (8-201); A.S.A. 1947, § 85-8-201.

4-8-202. Acts 1961, No. 185, § 8-202; 1985, No. 514, § 3 (8-202); A.S.A. 1947, § 85-8-202.

4-8-203. Acts 1961, No. 185, § 8-203;

1985, No. 514, § 3 (8-203); A.S.A. 1947, § 85-8-203.

4-8-204. Acts 1961, No. 185, § 8-204; 1985, No. 514, § 3 (8-204); A.S.A. 1947, § 85-8-204.

4-8-205. Acts 1961, No. 185, § 8-205; 1985, No. 514, § 3 (8-205); A.S.A. 1947, § 85-8-205.

4-8-206. Acts 1961, No. 185, § 8-206; 1985, No. 514, § 3 (8-206); A.S.A. 1947, § 85-8-206.

- 4-8-207. Acts 1961, No. 185, § 8-207; (8-208); A.S.A. 1947, § 85-8-208.
 1985, No. 514, § 3 (8-207); A.S.A. 1947, For Comments regarding the Uniform
 § 85-8-207. Commercial Code, see Commentaries Vol-
 4-8-208. Acts 1961, No. 185, § 8-208; ume A.
 1967, No. 303, § 27; 1985, No. 514, § 3

RESEARCH REFERENCES

- ALR.** Construction and effect of UCC § 8-207(1) allowing issuer of investment security to treat registered owner as enti-
 tled to owner's rights until presentment for registration of transfer. 21 ALR 4th 879.

4-8-201. Issuer.

(a) With respect to an obligation on or a defense to a security, an "issuer" includes a person that:

(1) places or authorizes the placing of its name on a security certificate, other than as authenticating trustee, registrar, transfer agent, or the like, to evidence a share, participation, or other interest in its property or in an enterprise, or to evidence its duty to perform an obligation represented by the certificate;

(2) creates a share, participation, or other interest in its property or in an enterprise, or undertakes an obligation, that is an uncertificated security;

(3) directly or indirectly creates a fractional interest in its rights or property, if the fractional interest is represented by a security certificate; or

(4) becomes responsible for, or in place of, another person described as an issuer in this section.

(b) With respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate.

(c) With respect to a registration of a transfer, issuer means a person on whose behalf transfer books are maintained.

History. Acts 1995, No. 425, § 1.

4-8-202. Issuer's responsibility and defenses — Notice of defect or defense.

(a) Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate. A reference under this subsection does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice.

The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.

(b) The following rules apply if an issuer asserts that a security is not valid:

(1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.

(2) Paragraph (1) applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

(c) Except as otherwise provided in § 4-8-205, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.

(d) All other defenses of the issuer of a security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken the certificated security without notice of the particular defense.

(e) This section does not affect the right of a party to cancel a contract for a security "when, as and if issued" or "when distributed" in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.

(f) If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly.

History. Acts 1995, No. 425, § 1.

CASE NOTES

Liability of Issuer.

Where a church issued bonds bearing a printed facsimile signature of its treasurer without requiring validation of the bonds by a manual signature, and the president of the corporation acting as fiscal agent for the bond issue fraudulently used some of the bonds as collateral for a personal loan upon which he subsequently

defaulted and caused duplicates of such bonds to be printed and sold, the church was liable upon both sets of bonds. *First Am. Nat'l Bank v. Christian Found. Life Ins. Co.*, 242 Ark. 678, 420 S.W.2d 912 (1967) (decision under prior law).

Cited: *J.M. Prods., Inc. v. Arkansas Capital Corp.*, 51 Ark. App. 85, 910 S.W.2d 702 (1995) (decision under prior law).

4-8-203. Staleness as notice of defect or defense.

After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer, if the act or event:

(1) requires the payment of money, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the money or security is available on the date set for payment or exchange, and the purchaser takes the security more than one (1) year after that date; or

(2) is not covered by paragraph (1) and the purchaser takes the security more than two (2) years after the date set for surrender or presentation or the date on which performance became due.

History. Acts 1995, No. 425, § 1.

4-8-204. Effect of issuer's restriction on transfer.

A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

(1) the security is certificated and the restriction is noted conspicuously on the security certificate; or

(2) the security is uncertificated and the registered owner has been notified of the restriction.

History. Acts 1995, No. 425, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Corporations — Stock Transfer Restrictions Systematics, Inc. v. Mitchell and Act 409 of 1973, 27 Ark. L. Rev. 554.

4-8-205. Effect of unauthorized signature on security certificate.

An unauthorized signature placed on a security certificate before or in the course of issue is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security if the purchaser is without notice of the lack of authority and the signing has been done by:

(1) an authenticating trustee, registrar, transfer agent, or other person entrusted by the issuer with the signing of the security certificate or of similar security certificates, or the immediate preparation for signing of any of them; or

(2) an employee of the issuer, or of any of the persons listed in paragraph (1), entrusted with responsible handling of the security certificate.

History. Acts 1995, No. 425, § 1.

CASE NOTES

Facsimile Signature.

Where a church issued bonds bearing a printed facsimile signature of its treasurer without requiring validation of the bonds by a manual signature, and the president of the corporation acting as fiscal agent for the bond issue fraudulently used some of the bonds as collateral for a

personal loan upon which he subsequently defaulted and caused duplicates of the bonds to be printed and sold, the church was liable upon both sets of bonds in the hands of good faith purchasers for value. *First Am. Nat'l Bank v. Christian Found. Life Ins. Co.*, 242 Ark. 678, 420 S.W.2d 912 (1967) (decision under prior law).

4-8-206. Completion or alteration of security certificate.

(a) If a security certificate contains the signatures necessary to its issue or transfer but is incomplete in any other respect:

(1) any person may complete it by filling in the blanks as authorized; and

(2) even if the blanks are incorrectly filled in, the security certificate as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.

(b) A complete security certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms.

History. Acts 1995, No. 425, § 1.

4-8-207. Rights and duties of issuer with respect to registered owners.

(a) Before due presentment for registration of transfer of a certificated security in registered form or of an instruction requesting registration of transfer of an uncertificated security, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner.

(b) This chapter does not affect the liability of the registered owner of a security for a call, assessment, or the like.

History. Acts 1995, No. 425, § 1.

4-8-208. Effect of signature of authenticating trustee, registrar, or transfer agent.

(a) A person signing a security certificate as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security, if the purchaser is without notice of a particular defect, that:

(1) the certificate is genuine;

(2) the person's own participation in the issue of the security is within the person's capacity and within the scope of the authority received by the person from the issuer; and

(3) the person has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue.

(b) Unless otherwise agreed, a person signing under subsection (a) does not assume responsibility for the validity of the security in other respects.

History. Acts 1995, No. 425, § 1.

4-8-209. Issuer's lien.

A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate.

History. Acts 1995, No. 425, § 1.

4-8-210. Overissue.

(a) In this section, "overissue" means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has cured the overissue.

(b) Except as otherwise provided in subsections (c) and (d), the provisions of this chapter which validate a security or compel its issue or reissue do not apply to the extent that validation, issue, or reissue would result in overissue.

(c) If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated, against surrender of any security certificate the person holds.

(d) If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person's demand.

History. Acts 1995, No. 425, § 1.

PART 3 — TRANSFER OF CERTIFICATED AND UNCERTIFICATED SECURITIES

SECTION.

4-8-301. Delivery.

4-8-302. Rights of purchaser.

4-8-303. Protected purchaser.

4-8-304. Indorsement.

4-8-305. Instruction.

SECTION.

4-8-306. Effect of guaranteeing signature, indorsement, or instruction.

4-8-307. Purchaser's right to requisites for registration of transfer.

Publisher's Notes. Former part 3, concerning purchase of security interests, was repealed by Acts 1995, No. 425, § 1. The former part was derived from the following sources:

4-8-301. Acts 1961, No. 185, § 8-301; reen. 1967, No. 303, § 28 (8-301); 1985, No. 514, § 3 (8-301); A.S.A. 1947, § 85-8-301.

4-8-302. Acts 1961, No. 185, § 8-302; reen. 1967, No. 303, § 28 (8-302); 1985, No. 514, § 3 (8-302); A.S.A. 1947, § 85-8-302.

4-8-303. Acts 1961, No. 185, § 8-303; reen. 1967, No. 303, § 28 (8-303); 1985, No. 514, § 3 (8-303); A.S.A. 1947, § 85-8-303.

4-8-304. Acts 1961, No. 185, § 8-304; reen. 1967, No. 303, § 28 (8-304); 1985, No. 514, § 3 (8-304); A.S.A. 1947, § 85-8-304.

4-8-305. Acts 1961, No. 185, § 8-305; reen. 1967, No. 303, § 28 (8-305); 1985, No. 514, § 3 (8-305); A.S.A. 1947, § 85-8-305.

4-8-306. Acts 1961, No. 185, § 8-306; 1967, No. 303, § 28 (8-306); 1985, No. 514, § 3 (8-306); A.S.A. 1947, § 85-8-306.

4-8-307. Acts 1961, No. 185, § 8-307; reen. 1967, No. 303, § 28 (8-307); 1985, No. 514, § 3 (8-307); A.S.A. 1947, § 85-8-307.

4-8-308. Acts 1961, No. 185, § 8-308; 1967, No. 303, § 28 (8-308); 1985, No. 514, § 3 (8-308); A.S.A. 1947, § 85-8-308.

4-8-309. Acts 1961, No. 185, § 8-309; reen. 1967, No. 303, § 28 (8-309); 1985, No. 514, § 3 (8-309); A.S.A. 1947, § 85-8-309.

4-8-310. Acts 1961, No. 185, § 8-310, as added by Acts 1967, No. 303, § 28 (8-310); 1985, No. 514, § 3 (8-310); A.S.A. 1947, § 85-8-310.

4-8-311. Acts 1961, No. 185, § 8-311; reen. 1967, No. 303, § 28 (8-311); 1985, No. 514, § 3 (8-311); A.S.A. 1947, § 85-8-311.

4-8-312. Acts 1961, No. 185, § 8-312; reen. 1967, No. 303, § 28 (8-312); 1985, No. 514, § 3 (8-312); A.S.A. 1947, § 85-8-312.

4-8-313. Acts 1961, No. 185, § 8-313; 1967, No. 303, § 28 (8-313); 1985, No. 514, § 3 (8-313); A.S.A. 1947, § 85-8-313.

4-8-314. Acts 1961, No. 185, § 8-314; reen. 1967, No. 303, § 28 (8-314); 1985, No. 514, § 3 (8-314); A.S.A. 1947, § 85-8-314.

4-8-315. Acts 1961, No. 185, § 8-315; reen. 1967, No. 303, § 28 (8-315); 1985, No. 514, § 3 (8-315); A.S.A. 1947, § 85-8-315.

4-8-316. Acts 1961, No. 185, § 8-316; reen. 1967, No. 303, § 28 (8-316); 1985, No. 514, § 3 (8-316); A.S.A. 1947, § 85-8-316.

4-8-317. Acts 1961, No. 185, § 8-317; reen. 1967, No. 303, § 28 (8-317); 1985, No. 514, § 3 (8-317); A.S.A. 1947, § 85-8-317.

4-8-318. Acts 1961, No. 185, § 8-318; reen. 1967, No. 303, § 28 (8-318); 1985, No. 514, § 3 (8-318); A.S.A. 1947, § 85-8-318.

4-8-319. Acts 1961, No. 185, § 8-319; reen. 1967, No. 303, § 28 (8-319); 1985, No. 514, § 3 (8-319); A.S.A. 1947, § 85-8-319.

4-8-320. Acts 1961, No. 185, § 8-320, as added by Acts 1967, No. 303, § 28 (8-320); 1985, No. 514, § 3 (8-320); A.S.A. 1947, § 85-8-320.

4-8-321. Acts 1961, No. 185, § 8-321, as added by Acts 1985, No. 514, § 3; A.S.A. 1947, § 85-8-321.

For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Cross References. Transfer of shares held by fiduciary or nominee of fiduciary, liability, § 28-69-204.

Transfer of stock by corporate officials upon certificate of purchase from execution sale, § 16-66-412.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective

date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9

become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

4-8-301. Delivery.

- (a) Delivery of a certificated security to a purchaser occurs when:
- (1) the purchaser acquires possession of the security certificate;
 - (2) another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or
 - (3) a securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.
- (b) Delivery of an uncertificated security to a purchaser occurs when:
- (1) the issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or
 - (2) another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser.

History. Acts 1995, No. 425, § 1; 2001, No. 1439, § 19.

Amendments. The 2001 amendment rewrote (a)(3).

4-8-302. Rights of purchaser.

- (a) Except as otherwise provided in subsections (b) and (c), a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.
- (b) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.
- (c) A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser.

History. Acts 1995, No. 425, § 1; 2001, No. 1439, § 20.

Amendments. The 2001 amendment substituted the present language in (a) for the previous language which read: "Except as otherwise provided in subsections

(b) and (c), upon delivery of a certificated or uncertificated security to a purchaser, the purchaser acquires all rights in the security that the transferor had or had power to transfer."

4-8-303. Protected purchaser.

(a) "Protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:

- (1) gives value;
- (2) does not have notice of any adverse claim to the security; and
- (3) obtains control of the certificated or uncertificated security.

(b) In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim.

History. Acts 1995, No. 425, § 1.

CASE NOTES**Evidence Held Sufficient.**

Plaintiff made a prima facie case that it was a bona fide purchaser (now protected purchaser) by showing that defendant had possession of the stock certificate when it was given to plaintiff, that there was nothing on the face of the certificate to give plaintiff notice that it was invalid,

that the signatures on the certificate were valid, and that defendant had copies of the audited financial statements supporting his claim that he was a shareholder. *J.M. Prods., Inc. v. Arkansas Capital Corp.*, 51 Ark. App. 85, 910 S.W.2d 702 (1995) (decision under prior law).

4-8-304. Indorsement.

(a) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank indorsement to a special indorsement.

(b) An indorsement purporting to be only of part of a security certificate representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.

(c) An indorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the indorsement is on a separate document, until delivery of both the document and the certificate.

(d) If a security certificate in registered form has been delivered to a purchaser without a necessary indorsement, the purchaser may become a protected purchaser only when the indorsement is supplied. However, against a transferor, a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

(e) An indorsement of a security certificate in bearer form may give notice of an adverse claim to the certificate, but it does not otherwise affect a right to registration that the holder possesses.

(f) Unless otherwise agreed, a person making an indorsement assumes only the obligations provided in § 4-8-108 and not an obligation that the security will be honored by the issuer.

History. Acts 1995, No. 425, § 1.

4-8-305. Instruction.

(a) If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed, even though it has been completed incorrectly.

(b) Unless otherwise agreed, a person initiating an instruction assumes only the obligations imposed by § 4-8-108 and not an obligation that the security will be honored by the issuer.

History. Acts 1995, No. 425, § 1.

CASE NOTES

Cited: J.M. Prods., Inc. v. Arkansas Capital Corp., 51 Ark. App. 85, 910 S.W.2d 702 (1995) (decision under prior law).

4-8-306. Effect of guaranteeing signature, indorsement, or instruction.

(a) A person who guarantees a signature of an indorser of a security certificate warrants that at the time of signing:

(1) the signature was genuine;

(2) the signer was an appropriate person to indorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person; and

(3) the signer had legal capacity to sign.

(b) A person who guarantees a signature of the originator of an instruction warrants that at the time of signing:

(1) the signature was genuine;

(2) the signer was an appropriate person to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty; and

(3) the signer had legal capacity to sign.

(c) A person who specially guarantees the signature of an originator of an instruction makes the warranties of a signature guarantor under subsection (b) and also warrants that at the time the instruction is presented to the issuer:

(1) the person specified in the instruction as the registered owner of the uncertificated security will be the registered owner; and

(2) the transfer of the uncertificated security requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction.

(d) A guarantor under subsections (a) and (b) or a special guarantor under subsection (c) does not otherwise warrant the rightfulness of the transfer.

(e) A person who guarantees an indorsement of a security certificate makes the warranties of a signature guarantor under subsection (a) and also warrants the rightfulness of the transfer in all respects.

(f) A person who guarantees an instruction requesting the transfer of an uncertificated security makes the warranties of a special signature guarantor under subsection (c) and also warrants the rightfulness of the transfer in all respects.

(g) An issuer may not require a special guaranty of signature, a guaranty of indorsement, or a guaranty of instruction as a condition to registration of transfer.

(h) The warranties under this section are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An indorser or originator of an instruction whose signature, indorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor.

History. Acts 1995, No. 425, § 1.

4-8-307. Purchaser's right to requisites for registration of transfer.

Unless otherwise agreed, the transferor of a security on due demand shall supply the purchaser with proof of authority to transfer or with any other requisite necessary to obtain registration of the transfer of the security, but if the transfer is not for value, a transferor need not comply unless the purchaser pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer.

History. Acts 1995, No. 425, § 1.

PART 4 — REGISTRATION

SECTION.

- 4-8-401. Duty of issuer to register transfer.
- 4-8-402. Assurance that indorsement or instruction is effective.
- 4-8-403. Demand that issuer not register transfer.
- 4-8-404. Wrongful registration.
- 4-8-405. Replacement of lost, destroyed,

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- or wrongfully taken security certificate.
- 4-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.
- 4-8-407. Authenticating trustee, transfer agent, and registrar.

Publisher's Notes. Former part 4, concerning registration of a certificated security, was repealed by Acts 1995, No. 425,

§ 1. The former part was derived from the following sources:

4-8-401. Acts 1961, No. 185, § 8-401;

1985, No. 514, § 3 (8-401); A.S.A. 1947, § 85-8-401.

4-8-402. Acts 1961, No. 185, § 8-402; 1985, No. 514, § 3 (8-402); A.S.A. 1947, § 85-8-402.

4-8-403. Acts 1961, No. 185, § 8-403; 1985, No. 514, § 3 (8-403); A.S.A. 1947, § 85-8-403.

4-8-404. Acts 1961, No. 185, § 8-404; 1985, No. 514, § 3 (8-404); A.S.A. 1947, § 85-8-404.

4-8-405. Acts 1961, No. 185, § 8-405; 1985, No. 514, § 3 (8-405); A.S.A. 1947, § 85-8-405.

4-8-406. Acts 1961, No. 185, § 8-406; 1985, No. 514, § 3 (8-406); A.S.A. 1947, § 85-8-406.

4-8-407. Acts 1961, No. 185, § 8-407, as added by Acts 1985, No. 514, § 3 (8-407); A.S.A. 1947, § 85-8-407.

4-8-408. Acts 1961, No. 185, § 8-408, as added by Acts 1985, No. 514, § 3 (8-408); A.S.A. 1947, § 85-8-408.

For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

4-8-401. Duty of issuer to register transfer.

(a) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:

(1) under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;

(2) the indorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;

(3) reasonable assurance is given that the indorsement or instruction is genuine and authorized (§ 4-8-402);

(4) any applicable law relating to the collection of taxes has been complied with;

(5) the transfer does not violate any restriction on transfer imposed by the issuer in accordance with § 4-8-204;

(6) a demand that the issuer not register transfer has not become effective under § 4-8-403, or the issuer has complied with § 4-8-403(b) but no legal process or indemnity bond is obtained as provided in § 4-8-403(d); and

(7) the transfer is in fact rightful or is to a protected purchaser.

(b) If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer.

History. Acts 1995, No. 425, § 1.

4-8-402. Assurance that indorsement or instruction is effective.

(a) An issuer may require the following assurance that each necessary indorsement or each instruction is genuine and authorized:

(1) in all cases, a guaranty of the signature of the person making an indorsement or originating an instruction including, in the case of an instruction, reasonable assurance of identity;

(2) if the indorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign;

(3) if the indorsement is made or the instruction is originated by a fiduciary pursuant to § 4-8-107(a)(4) or (5), appropriate evidence of appointment or incumbency;

(4) if there is more than one (1) fiduciary, reasonable assurance that all who are required to sign have done so; and

(5) if the indorsement is made or the instruction is originated by a person not covered by another provision of this subsection, assurance appropriate to the case corresponding as nearly as may be to the provisions of this subsection.

(b) An issuer may elect to require reasonable assurance beyond that specified in this section.

(c) In this section:

(1) "Guaranty of the signature" means a guaranty signed by or on behalf of a person reasonably believed by the issuer to be responsible. An issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

(2) "Appropriate evidence of appointment or incumbency" means:

(i) in the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof and dated within sixty (60) days before the date of presentation for transfer; or

(ii) in any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by an issuer to be responsible or, in the absence of that document or certificate, other evidence the issuer reasonably considers appropriate.

History. Acts 1995, No. 425, § 1.

4-8-403. Demand that issuer not register transfer.

(a) A person who is an appropriate person to make an indorsement or originate an instruction may demand that the issuer not register transfer of a security by communicating to the issuer a notification that identifies the registered owner and the issue of which the security is a part and provides an address for communications directed to the person making the demand. The demand is effective only if it is received by the issuer at a time and in a manner affording the issuer reasonable opportunity to act on it.

(b) If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security after a demand that the issuer not register transfer has become effective, the issuer shall promptly communicate to (i) the person who

initiated the demand at the address provided in the demand and (ii) the person who presented the security for registration of transfer or initiated the instruction requesting registration of transfer a notification stating that:

(1) the certificated security has been presented for registration of transfer or the instruction for registration of transfer of the uncertificated security has been received;

(2) a demand that the issuer not register transfer had previously been received; and

(3) the issuer will withhold registration of transfer for a period of time stated in the notification in order to provide the person who initiated the demand an opportunity to obtain legal process or an indemnity bond.

(c) The period described in subsection (b)(3) may not exceed thirty (30) days after the date of communication of the notification. A shorter period may be specified by the issuer if it is not manifestly unreasonable.

(d) An issuer is not liable to a person who initiated a demand that the issuer not register transfer for any loss the person suffers as a result of registration of a transfer pursuant to an effective indorsement or instruction if the person who initiated the demand does not, within the time stated in the issuer's communication, either:

(1) obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the issuer from registering the transfer; or

(2) file with the issuer an indemnity bond, sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar, or other agent of the issuer involved from any loss it or they may suffer by refusing to register the transfer.

(e) This section does not relieve an issuer from liability for registering transfer pursuant to an indorsement or instruction that was not effective.

History. Acts 1995, No. 425, § 1.

4-8-404. Wrongful registration.

(a) Except as otherwise provided in § 4-8-406, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered:

(1) pursuant to an ineffective indorsement or instruction;

(2) after a demand that the issuer not register transfer became effective under § 4-8-403(a) and the issuer did not comply with § 4-8-403(b);

(3) after the issuer had been served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, and the issuer had a

reasonable opportunity to act on the injunction, restraining order, or other legal process; or

(4) by an issuer acting in collusion with the wrongdoer.

(b) An issuer that is liable for wrongful registration of transfer under subsection (a) on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration. If an overissue would result, the issuer's liability to provide the person with a like security is governed by § 4-8-210.

(c) Except as otherwise provided in subsection (a) or in a law relating to the collection of taxes, an issuer is not liable to an owner or other person suffering loss as a result of the registration of a transfer of a security if registration was made pursuant to an effective indorsement or instruction.

History. Acts 1995, No. 425, § 1.

4-8-405. Replacement of lost, destroyed, or wrongfully taken security certificate.

(a) If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:

(1) so requests before the issuer has notice that the certificate has been acquired by a protected purchaser;

(2) files with the issuer a sufficient indemnity bond; and

(3) satisfies other reasonable requirements imposed by the issuer.

(b) If, after the issue of a new security certificate, a protected purchaser of the original certificate presents it for registration of transfer, the issuer shall register the transfer unless an overissue would result. In that case, the issuer's liability is governed by § 4-8-210. In addition to any rights on the indemnity bond, an issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser.

History. Acts 1995, No. 425, § 1.

4-8-406. Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.

If a security certificate has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under § 4-8-404 or a claim to a new security certificate under § 4-8-405.

History. Acts 1995, No. 425, § 1.

4-8-407. Authenticating trustee, transfer agent, and registrar.

A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions.

History. Acts 1995, No. 425, § 1.

PART 5 — SECURITY ENTITLEMENTS**SECTION.**

- 4-8-501. Securities account — Acquisition of security entitlement from securities intermediary.
- 4-8-502. Assertion of adverse claim against entitlement holder.
- 4-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.
- 4-8-504. Duty of securities intermediary to maintain financial asset.
- 4-8-505. Duty of securities intermediary with respect to payments and distributions.
- 4-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.

SECTION.

- 4-8-507. Duty of securities intermediary to comply with entitlement order.
- 4-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.
- 4-8-509. Specification of duties of securities intermediary by other statute or regulation — Manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.
- 4-8-510. Rights of purchaser of security entitlement from entitlement holder.
- 4-8-511. Priority among security interests and entitlement holders.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsolescent and is in need of significant expansion to cover new categories of collateral, to promote electronic filing, to reduce duplicate filing, and to resolve conflicting case law. The revisions contained in this Act will bring greater certainty to financing transactions, and will reduce both

their cost and the cost of credit. Because current Article 9 is uniform throughout the United States, it becomes essential that the effective date for the substantial revisions contemplated by this Act be the same in every state. If Arkansas and all of the other states and territories do not act in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this

Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

RESEARCH REFERENCES

UALR L.J. Martin, An Arkansas Practitioner's Guide to Perfecting Security Interests in Securities, Brokerage Accounts, and Other Forms of Investment Property under Revised Article 8 and Amended Article 9, 19 UALR L.J. 1.

4-8-501. Securities account — Acquisition of security entitlement from securities intermediary.

(a) "Securities account" means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.

(b) Except as otherwise provided in subsections (d) and (e), a person acquires a security entitlement if a securities intermediary:

(1) indicates by book entry that a financial asset has been credited to the person's securities account;

(2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or

(3) becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account.

(c) If a condition of subsection (b) has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset.

(d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is treated as holding the financial asset directly rather than as having a security entitlement with respect to the financial asset.

(e) Issuance of a security is not establishment of a security entitlement.

History. Acts 1995, No. 425, § 1.

4-8-502. Assertion of adverse claim against entitlement holder.

An action based on an adverse claim to a financial asset, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who acquires a security entitlement under § 4-8-501 for value and without notice of the adverse claim.

History. Acts 1995, No. 425, § 1.

4-8-503. Property interest of entitlement holder in financial asset held by securities intermediary.

(a) To the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are held by the securities intermediary for the entitlement holders, are not property of the securities intermediary, and are not subject to claims of creditors of the securities intermediary, except as otherwise provided in § 4-8-511.

(b) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) is a pro rata property interest in all interests in that financial asset held by the securities intermediary, without regard to the time the entitlement holder acquired the security entitlement or the time the securities intermediary acquired the interest in that financial asset.

(c) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) may be enforced against the securities intermediary only by exercise of the entitlement holder's rights under §§ 4-8-505 — 4-8-508.

(d) An entitlement holder's property interest with respect to a particular financial asset under subsection (a) may be enforced against a purchaser of the financial asset or interest therein only if:

(1) insolvency proceedings have been initiated by or against the securities intermediary;

(2) the securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;

(3) the securities intermediary violated its obligations under § 4-8-504 by transferring the financial asset or interest therein to the purchaser; and

(4) the purchaser is not protected under subsection (e).

The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

(e) An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection (a), whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under § 4-8-504.

4-8-504. Duty of securities intermediary to maintain financial asset.

(a) A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one (1) or more other securities intermediaries.

(b) Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection (a).

(c) A securities intermediary satisfies the duty in subsection (a) if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.

(d) This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

History. Acts 1995, No. 425, § 1.

4-8-505. Duty of securities intermediary with respect to payments and distributions.

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

History. Acts 1995, No. 425, § 1.

4-8-506. Duty of securities intermediary to exercise rights as directed by entitlement holder.

A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

History. Acts 1995, No. 425, § 1.

4-8-507. Duty of securities intermediary to comply with entitlement order.

(a) A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to comply with the entitlement order. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.

(b) If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

History. Acts 1995, No. 425, § 1.

4-8-508. Duty of securities intermediary to change entitlement holder's position to other form of security holding.

A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

History. Acts 1995, No. 425, § 1.

4-8-509. Specification of duties of securities intermediary by other statute or regulation — Manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.

(a) If the substance of a duty imposed upon a securities intermediary by §§ 4-8-504 — 4-8-508 is the subject of other statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.

(b) To the extent that specific standards for the performance of the duties of a securities intermediary or the exercise of the rights of an entitlement holder are not specified by other statute, regulation, or rule or by agreement between the securities intermediary and entitlement holder, the securities intermediary shall perform its duties and the entitlement holder shall exercise its rights in a commercially reasonable manner.

(c) The obligation of a securities intermediary to perform the duties imposed by §§ 4-8-504 — 4-8-508 is subject to:

(1) rights of the securities intermediary arising out of a security interest under a security agreement with the entitlement holder or otherwise; and

(2) rights of the securities intermediary under other law, regulation, rule, or agreement to withhold performance of its duties as a result of unfulfilled obligations of the entitlement holder to the securities intermediary.

(d) Sections 4-8-504 — 4-8-508 do not require a securities intermediary to take any action that is prohibited by other statute, regulation, or rule.

History. Acts 1995, No. 425, § 1.

4-8-510. Rights of purchaser of security entitlement from entitlement holder.

(a) In a case not covered by the priority rules in chapter 9 or the rules stated in subsection (c), an action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under § 4-8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in chapter 9, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Except as

otherwise provided in subsection (d), purchasers who have control rank according to priority in time of:

(1) the purchaser's becoming the person for whom the securities account, in which the security entitlement is carried, is maintained, if the purchaser obtained control under § 4-8-106(d)(1);

(2) the securities intermediary's agreement to comply with the purchaser's entitlement orders with respect to security entitlements carried or to be carried in the securities account in which the security entitlement is carried, if the purchaser obtained control under § 4-8-106(d)(2); or

(3) if the purchaser obtained control through another person under § 4-8-106(d)(3), the time on which priority would be based under this subsection if the other person were the secured party.

(d) A securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary.

History. Acts 1995, No. 425, § 1; 2001, No. 1439, § 21.

Amendments. The 2001 amendment rewrote (a) and (c).

4-8-511. Priority among security interests and entitlement holders.

(a) Except as otherwise provided in subsections (b) and (c), if a securities intermediary does not have sufficient interests in a particular financial asset to satisfy both its obligations to entitlement holders who have security entitlements to that financial asset and its obligation to a creditor of the securities intermediary who has a security interest in that financial asset, the claims of entitlement holders, other than the creditor, have priority over the claim of the creditor.

(b) A claim of a creditor of a securities intermediary who has a security interest in a financial asset held by a securities intermediary has priority over claims of the securities intermediary's entitlement holders who have security entitlements with respect to that financial asset if the creditor has control over the financial asset.

(c) If a clearing corporation does not have sufficient financial assets to satisfy both its obligations to entitlement holders who have security entitlements with respect to a financial asset and its obligation to a creditor of the clearing corporation who has a security interest in that financial asset, the claim of the creditor has priority over the claims of entitlement holders.

History. Acts 1995, No. 425, § 1.

PART 6 — APPLICABILITY

SECTION.

4-8-601, 4-8-602. [Reserved.]

SECTION.

4-8-603. Savings clause.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

4-8-601, 4-8-602. [Reserved.]

4-8-603. Savings clause.

(a) This chapter does not affect an action or proceeding commenced before this chapter takes effect.

(b) If a security interest in a security is perfected on or before the date this chapter takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this chapter, no further action is required to continue perfection. If a security interest in a security is perfected on or before the date this chapter takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this chapter, the security interest remains perfected for a period of four (4) months after the effective date and continues perfected thereafter if appropriate action to perfect under this chapter is taken within that period. If a security interest is perfected at the date this chapter takes effect and the security interest can be perfected by filing under this chapter, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect.

History. Acts 1995, No. 425, § 22.

became effective on the general effective

A.C.R.C. Notes. Acts 1995, No. 425

date, July 28, 1995.

CHAPTER 9

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7. TRANSITION.

Publisher's Notes. Former chapter 9 was repealed by Acts 2001, No. 1439, § 1. Former chapter 9 was derived from the following sources:

4-9-101. Acts 1961, No. 185, § 9-101; reen. 1973, No. 116, § 1 (9-101); A.S.A. 1947, § 85-9-101.

4-9-102. Acts 1961, No. 185, § 9-102; 1973, No. 116, § 1 (9-102); A.S.A. 1947, § 85-9-102; Acts 1999, No. 1556, § 2.

4-9-103. Acts 1961, No. 185, § 9-103; 1967, No. 303, § 29; 1973, No. 116, § 1 (9-103); 1985, No. 514, §§ 4, 5; A.S.A. 1947, § 85-9-103; Acts 1995, No. 425, § 6; 1997, No. 1070, § 4; 1999, No. 1556, § 3.

4-9-104. Acts 1961, No. 185, § 9-104; 1973, No. 116, § 1 (9-104); A.S.A. 1947, § 85-9-104; Acts 1997, No. 1070, § 5.

4-9-105. Acts 1961, No. 185, § 9-105; 1973, No. 116, § 1 (9-105); 1985, No. 514, § 6; A.S.A. 1947, § 85-9-105; Acts 1995, No. 425, §§ 7, 8; 1997, No. 1070, § 6; 1997, No. 1253, § 1; 1999, No. 1556, § 4.

4-9-106. Acts 1961, No. 185, § 9-106; 1973, No. 116, § 1 (9-106); A.S.A. 1947, § 85-9-106; Acts 1995, No. 425, § 9; 1997, No. 1070, § 7.

4-9-107. Acts 1961, No. 185, § 9-107; reen. 1973, No. 116, § 1 (9-107); A.S.A. 1947, § 85-9-107.

4-9-108. Acts 1961, No. 185, § 9-108; reen. 1973, No. 116, § 1 (9-108); A.S.A. 1947, § 85-9-108.

4-9-109. Acts 1961, No. 185, § 9-109; 1971, No. 363, § 1; 1973, No. 116, § 1 (9-109); A.S.A. 1947, § 85-9-109.

4-9-110. Acts 1961, No. 185, § 9-110; reen. 1973, No. 116, § 1 (9-110); A.S.A. 1947, § 85-9-110.

4-9-111. Acts 1961, No. 185, § 9-111; reen. 1973, No. 116, § 1 (9-111); A.S.A. 1947, § 85-9-111.

4-9-112. Acts 1961, No. 185, § 9-112; reen. 1973, No. 116, § 1 (9-112); A.S.A. 1947, § 85-9-112.

4-9-113. Acts 1961, No. 185, § 9-113; reen. 1973, No. 116, § 1 (9-113); A.S.A. 1947, § 85-9-113; Acts 1993, No. 439, § 4.

4-9-114. Acts 1961, No. 185, § 9-114, as

added by Acts 1973, No. 116, § 1 (9-114); A.S.A. 1947, § 85-9-114; Acts 1997, No. 395, § 2.

4-9-115. Acts 1995, No. 425, § 10.

4-9-116. Acts 1995, No. 425, § 10.

4-9-201. Acts 1961, No. 185, § 9-201; reen. 1973, No. 116, § 1 (9-201); A.S.A. 1947, § 85-9-201.

4-9-202. Acts 1961, No. 185, § 9-202; reen. 1973, No. 116, § 1 (9-202); A.S.A. 1947, § 85-9-202.

4-9-203. Acts 1961, No. 185, § 9-203; 1973, No. 116, § 1 (9-203); 1985, No. 514, § 7; A.S.A. 1947, § 85-9-203; Acts 1995, No. 425, § 11.

4-9-204. Acts 1961, No. 185, § 9-204; 1973, No. 116, § 1 (9-204); 1983, No. 561, § 1; A.S.A. 1947, § 85-9-204.

4-9-205. Acts 1961, No. 185, § 9-205; 1973, No. 116, § 1 (9-205); A.S.A. 1947, § 85-9-205.

4-9-206. Acts 1961, No. 185, § 9-206; 1967, No. 303, § 30; reen. 1973, No. 116, § 1 (9-206); A.S.A. 1947, § 85-9-206.

4-9-207. Acts 1961, No. 185, § 9-207; 1973, No. 116, § 1; A.S.A. 1947, § 85-9-207.

4-9-208. Acts 1961, No. 185, § 9-208; reen. 1973, No. 116, § 1 (9-208); A.S.A. 1947, § 85-9-208.

4-9-301. Acts 1961, No. 185, § 9-301; 1973, No. 116, § 1 (9-301); 1983, No. 561, § 2; A.S.A. 1947, § 85-9-301; Acts 1995, No. 425, § 12.

4-9-302. Acts 1961, No. 185, § 9-302; 1973, No. 116, § 1 (9-302); 1983, No. 561, § 3; 1985, No. 514, § 8; A.S.A. 1947, § 85-9-302; Acts 1993, No. 877, § 1; 1995, No. 425, § 13.

4-9-303. Acts 1961, No. 185, § 9-303; reen. 1973, No. 116, § 1 (9-303); A.S.A. 1947, § 85-9-303.

4-9-304. Acts 1961, No. 185, § 9-304; 1973, No. 116, § 1 (9-304); 1985, No. 514, § 9; A.S.A. 1947, § 85-9-304; Acts 1995, No. 425, §§ 14, 15; 1997, No. 1070, § 8.

4-9-305. Acts 1961, No. 185, § 9-305; 1973, No. 116, § 1 (9-305); 1985, No. 514, § 10; A.S.A. 1947, § 85-9-305; Acts 1995, No. 425, § 16.

4-9-306. Acts 1961, No. 185, § 9-306;

1973, No. 116, § 1 (9-306); 1975, No. 215, § 1; 1983, No. 561, § 4; A.S.A. 1947, § 85-9-306; Acts 1995, No. 425, §§ 17, 18.

4-9-307. Acts 1961, No. 185, § 9-307; 1973, No. 116, § 1 (9-307); 1986 (2nd Ex. Sess.), No. 16, § 1; A.S.A. 1947, § 85-9-307; Acts 1987, No. 108, § 6; 1989, No. 655, § 1.

4-9-308. Acts 1961, No. 185, § 9-308; 1973, No. 116, § 1 (9-308); A.S.A. 1947, § 85-9-308.

4-9-309. Acts 1961, No. 185, § 9-309; reen. 1973, No. 116, § 1 (9-309); 1985, No. 514, § 11; A.S.A. 1947, § 85-9-309; Acts 1995, No. 425, § 19.

4-9-310. Acts 1961, No. 185, § 9-310; reen. 1973, No. 116, § 1 (9-310); A.S.A. 1947, § 85-9-310.

4-9-311. Acts 1961, No. 185, § 9-311; reen. 1973, No. 116, § 1 (9-311); A.S.A. 1947, § 85-9-311.

4-9-312. Acts 1961, No. 185, § 9-312; 1973, No. 116, § 1 (9-312); 1983, No. 561, § 5; 1985, No. 514, § 12; A.S.A. 1947, § 85-9-312; Acts 1987, No. 560, § 1; 1989, No. 654, §§ 1, 3; 1995, No. 425, §§ 20, 21.

4-9-313. Acts 1961, No. 185, § 9-313; 1973, No. 116, § 1 (9-313); A.S.A. 1947, § 85-9-313.

4-9-314. Acts 1961, No. 185, § 9-314; 1967, No. 303, § 31; reen. 1973, No. 116, § 1 (9-314); A.S.A. 1947, § 85-9-314.

4-9-315. Acts 1961, No. 185, § 9-315; reen. 1973, No. 116, § 1 (9-315); A.S.A. 1947, § 85-9-315.

4-9-316. Acts 1961, No. 185, § 9-316; reen. 1973, No. 116, § 1 (9-316); A.S.A. 1947, § 85-9-316.

4-9-317. Acts 1961, No. 185, § 9-317; reen. 1973, No. 116, § 1 (9-318); A.S.A. 1947, § 85-9-317.

4-9-318. Acts 1961, No. 185, § 9-318; 1973, No. 116, § 1 (9-318); A.S.A. 1947, § 85-9-318.

4-9-401. Acts 1961, No. 185, § 9-401; 1973, No. 116, § 1 (9-401); A.S.A. 1947, § 85-9-401.

4-9-402. Acts 1961, No. 185, § 9-402; 1973, No. 116, § 1 (9-402); A.S.A. 1947, § 85-9-402; Acts 1993, No. 451, § 1.

4-9-403. Acts 1961, No. 185, § 9-403; 1967, No. 303, § 32; 1973, No. 116, § 1 (9-403); 1979, No. 998, § 1; A.S.A. 1947, §§ 85-9-401.1, 85-9-403; Acts 1989, No. 534, § 3; 1997, No. 395, § 3; 1997, No. 420, § 1; 1999, No. 1480, § 2; 1999, No. 1556, § 5.

4-9-404. Acts 1961, No. 185, § 9-404;

1967, No. 303, § 33; 1973, No. 116, § 1 (9-404); 1979, No. 998, § 1; A.S.A. 1947, §§ 85-9-401.1, 85-9-404; Acts 1989, No. 534, § 4; 1995, No. 104, § 1; 1997, No. 420, § 2; 1997, No. 1267, § 1; 1999, No. 1480, § 1.

4-9-405. Acts 1961, No. 185, § 9-405; 1973, No. 116, § 1 (9-405); 1979, No. 998, § 1; A.S.A. 1947, §§ 85-9-401.1, 85-9-405; Acts 1989, No. 534, § 5; 1997, No. 420, § 3; 1999, No. 1480, § 3.

4-9-406. Acts 1961, No. 185, § 9-406; 1973, No. 116, § 1 (9-406); 1979, No. 998, § 1; A.S.A. 1947, §§ 85-9-401.1, 85-9-406; Acts 1989, No. 534, § 6; 1995, No. 781, § 1; 1997, No. 420, § 4; 1999, No. 1480, § 4.

4-9-407. Acts 1961, No. 185, § 9-407; 1973, No. 116, § 1 (9-407); 1979, No. 998, § 1; 1986 (2nd Ex. Sess.), No. 16, § 2; A.S.A. 1947, §§ 85-9-401.1, 85-9-407; Acts 1987, No. 108, §§ 7, 11; 1989, No. 534, § 7; 1989, No. 655, § 2; 1997, No. 420, § 5; 1999, No. 1480, § 5.

4-9-408. Acts 1961, No. 185, § 9-408, as added by Acts 1973, No. 116, § 1 (9-408); A.S.A. 1947, § 85-9-408.

4-9-409. Acts 1961, No. 185, § 9-408; 1973, No. 116, § 1 (9-409); A.S.A. 1947, § 85-9-409.

4-9-501. Acts 1961, No. 185, § 9-501; 1973, No. 116, § 1 (9-501); A.S.A. 1947, § 85-9-501.

4-9-502. Acts 1961, No. 185, § 9-502; 1967, No. 303, § 35; 1973, No. 116, § 1 (9-502); A.S.A. 1947, § 85-9-502.

4-9-503. Acts 1961, No. 185, § 9-503; 1973, No. 116, § 1 (9-503); A.S.A. 1947, § 85-9-503.

4-9-504. Acts 1961, No. 185, § 9-504; 1973, No. 116, § 1 (9-504); A.S.A. 1947, § 85-9-504.

4-9-505. Acts 1961, No. 185, § 9-505; 1973, No. 116, § 1 (9-505); A.S.A. 1947, § 85-9-505.

4-9-506. Acts 1961, No. 185, § 9-506; 1973, No. 116, § 1 (9-506); A.S.A. 1947, § 85-9-506.

4-9-507. Acts 1961, No. 185, § 9-507; 1973, No. 116, § 1 (9-507); A.S.A. 1947, § 85-9-507.

Effective Dates. Acts 2001, No. 1439, § 23: July 1, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present Article 9 of the Uniform Commercial Code which exists in all fifty states, the District of Columbia, and Puerto Rico is obsoles-

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in concert and enact a common effective date, severe complications will arise. For example, the proper place to perfect a security interest depends on the law of the state where the issue is litigated. Therefore, the rules for filing must be uniform at all times. Because the several states are proposing that the revised Article 9 become effective on July 1, 2001 an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect on July 1, 2001."

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Government agricultural program payments as proceeds of agricultural products under UCC § 9-306. 79 ALR 4th 903.

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Equitable estoppel of secured party's right to assert prior perfected security interest against another creditor or subsequent purchaser under Article 9 of UCC. 9 ALR 5th 708.

Right of secured party to take possession of collateral on default under UCC § 9-503. 25 ALR 5th 696.

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CASE NOTES

ANALYSIS

Applicability.
Good faith.

Applicability.

Because former § 4-9-104(e) excepts from the operations of this chapter a transfer by a government or governmental subdivision or agency, this chapter is inapplicable to improvement districts. *Quapaw Cent. Bus. Imp. Dist. v. Bond-Kinman, Inc.*, 315 Ark. 703, 870 S.W.2d 390 (1994) (decision under prior law).

Good Faith.

Former § 4-1-203 permits the lack of good faith of party who first perfected security interest toward the second lien-

holder to alter priorities which otherwise would be determined under this chapter. *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969) (decision under prior law).

Cited: *United States v. Thompson*, 272 F. Supp. 774 (E.D. Ark. 1967), aff'd, 408 F.2d 1075 (8th Cir. 1969); *Toronto-Dominion Bank v. Hall*, 367 F. Supp. 1009 (E.D. Ark. 1973); *McIlroy Bank & Trust v. Federal Land Bank*, 266 Ark. 481, 585 S.W.2d 947 (1979); *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981); *Mayhew v. Loveless*, 1 Ark. App. 69, 613 S.W.2d 118 (1981); *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 588 F. Supp. 1266 (E.D. Ark. 1984) (decisions under prior law).

PART 1 — GENERAL PROVISIONS

A.C.R.C. Notes. Acts 2001, No. 1439, § 22, provided: "(a) In this section: (1) 'Local filing office' means a filing office other than the Secretary of State, that is designated as the proper place to file a financing statement under Arkansas Code 4-9-401(1) as it existed on June 30, 2001. The term applies only with respect to a record that covers a type of collateral as to which the filing office is designated in that section as the proper place to file. (2) 'Former Chapter 9' means Chapter 9 of

Title 4 of the Arkansas Code as it existed on June 30, 2001. (3)(A) 'Former Chapter 9 records' means: (i) Financing statements and other records that have been filed in a local filing office before July 1, 2001, and that are, or upon processing and indexing will be, reflected in the index maintained, as of June 30, 2001, by the local filing office for financing statements and other records filed in the local filing office before July 1, 2001, and (ii) The index as of June 30, 2001. (B) The term

does not include records presented to a local filing office for filing after June 30, 2001, whether or not the records relate to financing statements filed in the local filing office before July 1, 2001. (4) "Mortgage", "as-extracted collateral", "fixture filing", "goods" and "fixtures" have the meanings set forth in Arkansas Code 4-9-102 for those terms.

"(b) A local filing office must not accept for filing a record presented after June 30, 2001, whether or not the record relates to a financing statement filed in the local filing office before July 1, 2001.

"(c) Until July 1, 2008, each local filing office must maintain all former Chapter 9 records in accordance with former Chapter 9. A former Chapter 9 record that is not reflected on the index maintained at June 30, 2001, by the local filing office must be processed and indexed, and reflected on the index as of June 30, 2001, as

soon as practicable but in any event no later than July 30, 2001.

"(e) After June 30, 2008, each local filing office may remove and destroy, in accordance with any then applicable record retention law of this State, all former Chapter 9 records, including the related index.

"(f) This section does not apply, with respect to financing statements and other records, to a filing office in which mortgages or records of mortgages on real property are required to be filed or recorded, if: (1) The collateral is timber to be cut or as-extracted collateral, or (2) The record is or relates to a financing statement filed as a fixture filing and the collateral is goods that are or are to become fixtures."

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

Am. Jur. 68A Am. Jur. 2d, Secured Trans., § 1 et seq.

C.J.S. 79 C.J.S. Supp., Secured Trans., § 1 et seq.

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SUBPART 1

SHORT TITLE, DEFINITIONS, AND GENERAL CONCEPTS

SECTION.

4-9-101. Short title.

4-9-102. Definitions and index of definitions.

4-9-103. Purchase-money security interest — Application of payments — Burden of establishing.

SECTION.

4-9-104. Control of deposit account.

4-9-105. Control of electronic chattel paper.

4-9-106. Control of investment property.

4-9-107. Control of letter-of-credit right.

4-9-108. Sufficiency of description.

4-9-101. Short title.

This chapter may be cited as Uniform Commercial Code — Secured Transactions.

History. Acts 2001, No. 1439, § 1.

4-9-102. Definitions and index of definitions.

(a) In this chapter:

(1) "Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.

(2) "Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

(3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.

(4) "Accounting", except as used in "accounting for", means a record:

(A) authenticated by a secured party;

(B) indicating the aggregate unpaid secured obligations as of a date not more than thirty-five (35) days earlier or thirty-five (35) days later than the date of the record; and

(C) identifying the components of the obligations in reasonable detail.

(5) "Agricultural lien" means an interest, other than a security interest, in farm products:

(A) which secures payment or performance of an obligation for:

(i) goods or services furnished in connection with a debtor's farming operation; or

(ii) rent on real property leased by a debtor in connection with its farming operation;

(B) which is created by statute in favor of a person that:

(i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

(ii) leased real property to a debtor in connection with the debtor's farming operation; and

(C) whose effectiveness does not depend on the person's possession of the personal property.

(6) "As-extracted collateral" means:

(A) oil, gas, or other minerals that are subject to a security interest that:

(i) is created by a debtor having an interest in the minerals before extraction; and

(ii) attaches to the minerals as extracted; or

(B) accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

(7) "Authenticate" means:

(A) to sign; or

(B) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.

(8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.

(9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

(11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.

(12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:

(A) proceeds to which a security interest attaches;

(B) accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and

(C) goods that are the subject of a consignment.

(13) "Commercial tort claim" means a claim arising in tort with respect to which:

(A) the claimant is an organization; or

(B) the claimant is an individual and the claim:

(i) arose in the course of the claimant's business or profession; and

(ii) does not include damages arising out of personal injury to or the death of an individual.

(14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(15) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:

(A) traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or

(B) traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(16) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

(17) "Commodity intermediary" means a person that:

(A) is registered as a futures commission merchant under federal commodities law; or

(B) in the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.

(18) "Communicate" means:

(A) to send a written or other tangible record;

(B) to transmit a record by any means agreed upon by the persons sending and receiving the record; or

(C) in the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing office rule.

(19) "Consignee" means a merchant to which goods are delivered in a consignment.

(20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) the merchant:

(i) deals in goods of that kind under a name other than the name of the person making delivery;

(ii) is not an auctioneer; and

(iii) is not generally known by its creditors to be substantially engaged in selling the goods of others;

(B) with respect to each delivery, the aggregate value of the goods is one thousand dollars (\$1,000) or more at the time of delivery;

(C) the goods are not consumer goods immediately before delivery; and

(D) the transaction does not create a security interest that secures an obligation.

(21) "Consignor" means a person that delivers goods to a consignee in a consignment.

(22) "Consumer debtor" means a debtor in a consumer transaction.

(23) "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes.

(24) "Consumer-goods transaction" means a consumer transaction in which:

(A) an individual incurs an obligation primarily for personal, family, or household purposes; and

(B) a security interest in consumer goods secures the obligation.

(25) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(26) "Consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

(27) "Continuation statement" means an amendment of a financing statement which:

(A) identifies, by its file number, the initial financing statement to which it relates; and

(B) indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.

(28) "Debtor" means:

(A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) a seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) a consignee.

(29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.

(30) "Document" means a document of title or a receipt of the type described in § 4-7-201(2).

(31) "Electronic chattel paper" means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.

(32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.

(33) "Equipment" means goods other than inventory, farm products, or consumer goods.

(34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:

(A) crops grown, growing, or to be grown, including:

(i) crops produced on trees, vines, and bushes; and

(ii) aquatic goods produced in aquacultural operations;

(B) livestock, born or unborn, including aquatic goods produced in aquacultural operations;

(C) supplies used or produced in a farming operation; or

(D) products of crops or livestock in their unmanufactured states.

(35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.

(36) "File number" means the number assigned to an initial financing statement pursuant to § 4-9-519(a).

(37) "Filing office" means an office designated in § 4-9-501 as the place to file a financing statement.

(38) "Filing office rule" means a rule adopted pursuant to § 4-9-526.

(39) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.

(40) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying § 4-9-502(a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.

(41) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.

(42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(43) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(44) "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

(45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States.

(46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided.

(47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

(48) "Inventory" means goods, other than farm products, which:

(A) are leased by a person as lessor;

(B) are held by a person for sale or lease or to be furnished under a contract of service;

(C) are furnished by a person under a contract of service; or

(D) consist of raw materials, work in process, or materials used or consumed in a business.

(49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.

(50) "Jurisdiction of organization", with respect to a registered organization, means the jurisdiction under whose law the organization is organized.

(51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.

(52) "Lien creditor" means:

(A) a creditor that has acquired a lien on the property involved by attachment, levy, or the like;

(B) an assignee for benefit of creditors from the time of assignment;

(C) a trustee in bankruptcy from the date of the filing of the petition; or

(D) a receiver in equity from the time of appointment.

(53) "Manufactured home" means a structure, transportable in one (1) or more sections, which, in the traveling mode, is eight (8) body feet or more in width or forty (40) body feet or more in length, or, when erected on site, is three hundred twenty (320) or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States

Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.

(54) "Manufactured-home transaction" means a secured transaction:

(A) that creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or

(B) in which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.

(55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.

(56) "New debtor" means a person that becomes bound as debtor under § 4-9-203(d) by a security agreement previously entered into by another person.

(57) "New value" means (i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(58) "Noncash proceeds" means proceeds other than cash proceeds.

(59) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.

(60) "Original debtor", except as used in § 4-9-310(c), means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under § 4-9-203(d).

(61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.

(62) "Person related to", with respect to an individual, means:

(A) the spouse of the individual;

(B) a brother, brother-in-law, sister, or sister-in-law of the individual;

(C) an ancestor or lineal descendant of the individual or the individual's spouse; or

(D) any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.

(63) "Person related to", with respect to an organization, means:

(A) a person directly or indirectly controlling, controlled by, or under common control with the organization;

(B) an officer or director of, or a person performing similar functions with respect to, the organization;

(C) an officer or director of, or a person performing similar functions with respect to, a person described in subparagraph (A);

(D) the spouse of an individual described in subparagraph (A), (B), or (C); or

(E) an individual who is related by blood or marriage to an individual described in subparagraph (A), (B), (C), or (D) and shares the same home with the individual.

(64) "Proceeds", except as used in § 4-9-609(b), means the following property:

(A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(B) whatever is collected on, or distributed on account of, collateral;

(C) rights arising out of collateral;

(D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or

(E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(66) "Proposal" means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to §§ 4-9-620, 4-9-621, and 4-9-622.

(67) "Public-finance transaction" means a secured transaction in connection with which:

(A) debt securities are issued;

(B) all or a portion of the securities issued have an initial stated maturity of at least twenty (20) years; and

(C) the debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.

(68) "Pursuant to commitment", with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(69) "Qualified intangible property" means a fully vested property right consisting of the irrevocable right of an electric utility or an assignee to charge, collect, receive, and be paid from collections of qualified intangible charges in the amount necessary to recover fully the qualified costs which are determined to be recoverable by the Arkansas Public Service Commission pursuant to the Electric Consumer Choice Act of 1999, § 23-19-101 et seq., all right, title, and interest of the electric utility or assignee in and to the qualified rate order pursuant to which such qualified intangible charges are autho-

rized, including, without limitation, the right to obtain periodic adjustment of such qualified intangible charges pursuant to § 23-19-605(d), and all revenues, collections, claims, payments, money or proceeds of, or arising from, qualified intangible charges pursuant to such qualified rate order, whether or not the revenues and proceeds arising with respect thereto have accrued. Qualified intangible property shall constitute a contract right; it is not an account or general intangible.

(70) "Record", except as used in "for record", "of record", "record or legal title", and "record owner", means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

(71) "Registered organization" means an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.

(72) "Secondary obligor" means an obligor to the extent that:

(A) the obligor's obligation is secondary; or

(B) the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

(73) "Secured party" means:

(A) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;

(B) a person that holds an agricultural lien;

(C) a consignor;

(D) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;

(E) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or

(F) a person that holds a security interest arising under § 4-2-401, § 4-2-505, § 4-2-711(3), § 4-2A-508(5), § 4-4-210, or § 4-5-118.

(74) "Security agreement" means an agreement that creates or provides for a security interest.

(75) "Send", in connection with a record or notification, means:

(A) to deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) to cause the record or notification to be received within the time that it would have been received if properly sent under subparagraph (A).

(76) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.

(77) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any

territory or insular possession subject to the jurisdiction of the United States.

(78) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

(79) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.

(80) "Termination statement" means an amendment of a financing statement which:

(A) identifies, by its file number, the initial financing statement to which it relates; and

(B) indicates either that it is a termination statement or that the identified financing statement is no longer effective.

(81) "Transmitting utility" means a person primarily engaged in the business of:

(A) operating a railroad, subway, street railway, or trolley bus;

(B) transmitting communications electrically, electromagnetically, or by light;

(C) transmitting goods by pipeline or sewer; or

(D) producing or transmitting electricity, steam, gas, or water.

(b) The following definitions in other chapters apply to this chapter:

"Applicant" § 4-5-102.

"Beneficiary" § 4-5-102.

"Broker" § 4-8-102.

"Certificated security" § 4-8-102.

"Check" § 4-3-104.

"Clearing corporation" § 4-8-102.

"Contract for sale" § 4-2-106.

"Customer" § 4-4-104.

"Entitlement holder" § 4-8-102.

"Financial asset" § 4-8-102.

"Holder in due course" § 4-3-302.

"Issuer" (with respect to a letter of credit or letter-of-credit right) § 4-5-102.

"Issuer" (with respect to a security) § 4-8-201.

"Lease" § 4-2A-103.

"Lease agreement" § 4-2A-103.

"Lease contract" § 4-2A-103.

"Leasehold interest" § 4-2A-103.

"Lessee" § 4-2A-103.

"Lessee in ordinary course of business" § 4-2A-103.

"Lessor" § 4-2A-103.

"Lessor's residual interest" § 4-2A-103.

"Letter of credit" § 4-5-102.

"Merchant" § 4-2-104.

"Negotiable instrument" § 4-3-104.

"Nominated person" § 4-5-102.

"Note" § 4-3-104.

"Proceeds of a letter of credit" § 4-5-114.

"Prove" § 4-3-103.

"Sale" § 4-2-106.

"Securities account" § 4-8-501.

"Securities intermediary" § 4-8-102.

"Security" § 4-8-102.

"Security certificate" § 4-8-102.

"Security entitlement" § 4-8-102.

"Uncertificated security" § 4-8-102.

(c) Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Accounts.

Debtors.

Instruments.

Security agreements.

Accounts.

Where the evidence established that out of the amount listed by the contractor as accounts receivable, approximately 50 percent constituted retainage on construction contracts which were listed on the contractor's balance sheet as accounts receivable, although successful completion of the job was a condition precedent to receiving payment, and where, since the contractor did not complete its work on any projects after it filed bankruptcy, the retainage proved to be uncollectible due to various counterclaims and setoffs, the district court correctly included the retainage in the contractor's total outstanding accounts. *Davidson v. Union Nat'l Bank*, 605 F.2d 397 (8th Cir. 1979) (decision under prior law).

Letter of credit was not an account receivable where the particular letter of credit was never intended to be an account and was listed as such purely by happenstance. *Tradax Am., Inc. v. First Nat'l Bank*, 934 F.2d 969 (8th Cir. 1991) (decision under prior law).

Secured creditor of seller was entitled to recover that portion of a payment representing past due amounts that buyer already owed to seller, since this portion of

the payment did not represent payment for raw materials but represented payment on a debt owed by buyer. *Martin v. Amercable Corp.*, 990 F.2d 439 (8th Cir. 1993) (decision under prior law).

Debtors.

An automobile dealer, who sold a car in return for a promissory note and a conditional sales contract for the unpaid purchase price, and sold note and contract to a bank with provision that if car buyer should default he would repurchase the contract for the amount due thereon, was a debtor under former § 4-9-105 as one who owes "other performance" of the obligation secured. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds by *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987) (decision under prior law).

Accommodation maker held to be a "debtor" as defined by former § 4-9-105 because of the "other performance owed" language. In re *Long*, 83 Bankr. 579 (Bankr. E.D. Ark. 1987) (decision under prior law).

"Debtor" to whom notice is required includes one who is responsible for payment upon default of the principal obligor. *Hallmark Cards, Inc. v. Peevy*, 293 Ark. 594, 739 S.W.2d 691 (1987) (decision under prior law).

A guarantor is one who "owes payment or other performance of the obligation secured." *First Nat'l Bank v. Hess*, 23 Ark.

App. 129, 743 S.W.2d 825 (1988) (decision under prior law).

A corporation is an organization which may be a debtor under the pre-2001 version of Article 9 of the Uniform Commercial Code. *Rice v. Fas Fax Corp.* (In re Hot Shots Burgers & Fries, Inc.), 183 Bankr. 848 (Bankr. E.D. Ark. 1995) (decision under prior law).

Instruments.

Where a delivery debenture issued to the debtors by a cooperative and later delivered to a credit association as security for a debt owed by the debtors to the credit association conferred rights upon its holder, was in registered form, was one of a series of documents issued by the cooperative, evidenced an obligation of the issuer, was recognized in the area as a medium for investment, and was assignable, the delivery debenture was a "security" and qualified as an "instrument" within the meaning of the former § 4-9-105; therefore, when the secured party (credit association) took possession of the delivery debenture, it perfected its security interest in the debenture. *Davidson v. Arkansas River Valley Grain Drying Coop.*, 692 F.2d 55 (8th Cir. 1982) (decision under prior law).

Certificates of deposit are "instruments" as defined in the UCC and security interests in such instruments may be perfected through possession. *GE Co. v. M & C Mfg., Inc.*, 283 Ark. 110, 671 S.W.2d 189 (1984) (decision under prior law).

Where debtor assigned promissory note to his parents, but thereafter filed suit to collect the note, and transferred some of the proceeds to them, the parents did not "possess" the note while the debtor was enforcing it, and thus they did not have a perfected security interest in the note or

its proceeds, and the trustee was entitled to avoid the preferential transfer of the proceeds. *Luker v. Reeves*, 65 F.3d 670 (8th Cir. 1995) (decision under prior law).

Security Agreements.

Instrument which is simply a promissory note and nothing more and does not purport to retain title or to create a lien cannot be relied on as a security agreement. *Central Ark. Milk Producers Ass'n v. Arnold*, 239 Ark. 799, 394 S.W.2d 126 (1965) (decision under prior law).

Cited: *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964); *McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972); *Henson v. Government Employees Fin. & Indus. Loan Corp.*, 257 Ark. 273, 516 S.W.2d 1 (1974); *Benton State Bank v. Warren*, 263 Ark. 1, 562 S.W.2d 74 (1978); *Putnam Realty, Inc. v. Terminal Moving & Storage Co.*, 631 F.2d 547 (8th Cir. 1980); *Benton State Bank v. Warren*, 263 Ark. 1, 562 S.W.2d 74 (1978); *In re B. Hollis Knight Co.*, 461 F. Supp. 1213 (E.D. Ark. 1978); *Davidson v. Arkansas River Valley Drain Drying Coop.* (In re Glass), 26 Bankr. 166 (E.D. Ark. 1982'); *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464 (8th Cir. 1985); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *In re Russell*, 101 Bankr. 62 (Bankr. W.D. Ark. 1989); *Tradax Am., Inc. v. First Nat'l Bank* (In re Howell Enters., Inc.), 105 Bankr. 494 (Bankr. E.D. Ark. 1989); *United States v. Dawson*, 929 F.2d 1336 (8th Cir. 1991); *Barton v. United States, Farmers Home Admin.*, 132 Bankr. 23 (Bankr. W.D. Ark. 1991); *J.M. Prods., Inc. v. Arkansas Capital Corp.*, 51 Ark. App. 85, 910 S.W.2d 702 (1995) (decisions under prior law).

4-9-103. Purchase-money security interest — Application of payments — Burden of establishing.

(a) In this section:

(1) "purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and

(2) "purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

(b) A security interest in goods is a purchase-money security interest:

(1) to the extent that the goods are purchase-money collateral with respect to that security interest;

(2) if the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and

(3) also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

(c) A security interest in software is a purchase-money security interest to the extent that the security interest also secures a purchase-money obligation incurred with respect to goods in which the secured party holds or held a purchase-money security interest if:

(1) the debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods; and

(2) the debtor acquired its interest in the software for the principal purpose of using the software in the goods.

(d) The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory.

(e) In a transaction other than a consumer-goods transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(1) in accordance with any reasonable method of application to which the parties agree;

(2) in the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, in the following order:

(A) to obligations that are not secured; and

(B) if more than one (1) obligation is secured, to obligations secured by purchase-money security interests in the order in which those obligations were incurred.

(f) In a transaction other than a consumer-goods transaction, a purchase-money security interest does not lose its status as such, even if:

(1) the purchase-money collateral also secures an obligation that is not a purchase-money obligation;

(2) collateral that is not purchase-money collateral also secures the purchase-money obligation; or

(3) the purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

(g) In a transaction other than a consumer-goods transaction, a secured party claiming a purchase-money security interest has the burden of establishing the extent to which the security interest is a purchase-money security interest.

(h) The limitation of the rules in subsections (e), (f), and (g) to transactions other than consumer-goods transactions is intended to leave to the court the determination of the proper rules in consumer-goods transactions. The court may not infer from that limitation the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Chattel mortgages.
Landlord's lien.

Chattel Mortgages.

A chattel mortgage securing a note given for the purchase of farm machinery was a "purchase money security interest" within the meaning of former § 4-9-107. *Lonoke Production Credit Ass'n v. Bohannon*, 238 Ark. 206, 379 S.W.2d 17 (1964) (decision under prior law).

Landlord's Lien.

When the legislature adopted the landlord's lien in 1987 (§ 18-16-108), it was mindful of this state's longstanding aversion to a landlord's lien and of the strict construction that would be applied to such

legislation, and was also aware of the law and policies embodied in the U.C.C.; the legislature never intended a landlord's lien which arose simultaneously with a purchase money security interest, under former § 4-9-107 and § 4-9-312(4), to have priority. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993) (decision under prior law).

Cited: *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964); *Niedermeier v. Central Prod. Credit Ass'n*, 300 Ark. 116, 777 S.W.2d 210 (1989); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990) (decisions under prior law).

4-9-104. Control of deposit account.

(a) A secured party has control of a deposit account if:

(1) the secured party is the bank with which the deposit account is maintained;

(2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or

(3) the secured party becomes the bank's customer with respect to the deposit account.

(b) A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

History. Acts 2001, No. 1439, § 1.

4-9-105. Control of electronic chattel paper.

A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the secured party as the assignee of the record or records;

(3) the authoritative copy is communicated to and maintained by the secured party or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.

History. Acts 2001, No. 1439, § 1.

4-9-106. Control of investment property.

(a) A person has control of a certificated security, uncertificated security, or security entitlement as provided in § 4-8-106.

(b) A secured party has control of a commodity contract if:

(1) the secured party is the commodity intermediary with which the commodity contract is carried; or

(2) the commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(c) A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

History. Acts 2001, No. 1439, § 1.

4-9-107. Control of letter-of-credit right.

A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under § 4-5-114(c) or otherwise applicable law or practice.

History. Acts 2001, No. 1439, § 1.

4-9-108. Sufficiency of description.

(a) Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Except as otherwise provided in subsection (d), a description of collateral reasonably identifies the collateral if it identifies the collateral by:

- (1) specific listing;
- (2) category;
- (3) except as otherwise provided in subsection (e), a type of collateral defined in the Uniform Commercial Code;
- (4) quantity;
- (5) computational or allocational formula or procedure; or
- (6) except as otherwise provided in subsection (c), any other method, if the identity of the collateral is objectively determinable.

(c) A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral.

(d) Except as otherwise provided in subsection (e), a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

- (1) the collateral by those terms or as investment property; or
- (2) the underlying financial asset or commodity contract.

(e) A description only by type of collateral defined in the Uniform Commercial Code is an insufficient description of:

- (1) a commercial tort claim; or
- (2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.

History. Acts 2001, No. 1439, § 1.

CASE NOTES**ANALYSIS**

Insufficient descriptions.

Sufficient descriptions.

Test of sufficiency.

Insufficient Descriptions.

Descriptions in security agreements and financing statements establishing liens on growing crops were insufficient to identify the subject of the security agreement. *Piggott State Bank v. Pollard Gin Co.*, 243 Ark. 159, 419 S.W.2d 120 (1967) (decision under prior law).

Description of crops was insufficient as to the real estate not described under this section, § 4-9-402, and § 4-9-203. *People's Bank v. Pioneer Food Indus., Inc.*,

253 Ark. 277, 486 S.W.2d 24 (1972) (decision under prior law).

Where the only land description was the statement that the property would be located at the Greenway Elevator Company at Greenway, Arkansas, which was identified only by a post office box number, this was insufficient to meet Uniform Commercial Code requirements. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

Financing statement which neither indicated where equipment could be located nor disclosed the name of the business where the equipment was to be used fell short of the minimum requirement for collateral description. *Womack v.*

Newman Fixture Co., 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990) (decision under prior law).

A description that only describes the debtor's name and the county and state where the real estate is located is not a sufficient description. *Schieffler v. First Nat'l Bank (In re Peeler)*, 145 Bankr. 973 (Bankr. E.D. Ark. 1992) (decision under prior law).

Sufficient Descriptions.

A trial court erred in ruling that a description of the subject of a security agreement as "company owned inventory of" and giving the name and address of the company was insufficient as a matter of law. *Security Tire & Rubber Co. v. Hlass*, 246 Ark. 1113, 441 S.W.2d 91 (1969) (decision under prior law).

Description of crops and other plant products as collateral in security agreement and financial statement held sufficient. *United States v. Oakley*, 483 F. Supp. 762 (E.D. Ark. 1980) (decision under prior law).

Where financing statement contains a collateral description stating that "crops covered hereby are growing or are to be grown on" certain described real property, the use of the term "crops" is a sufficient description under this section to put third parties on notice that soybean crops are covered by the financing statement since third parties finding this term in a financing statement should reasonably construe it to include all crops on the subject property. *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981) (decision under prior law).

Description of crops was sufficient to

notify third parties that crops grown after the 1974 crop year are covered, and it should reasonably notify third parties that after-acquired property is part of the subject matter of the financing statement. *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981) (decision under prior law).

Test of Sufficiency.

The test is whether the description made possible the identification of the real estate. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

Nothing in the Arkansas statutes or case law indicates that a full legal description of real estate is required in a financing statement covering crops. *United States v. Oakley*, 483 F. Supp. 762 (E.D. Ark. 1980) (decision under prior law).

Where the information in the financing statement, together with inquiry suggested therein, would enable a stranger to the transaction to identify crops, the filing of the financing statement perfected the government's security interest in the crops. *United States v. Oakley*, 483 F. Supp. 762 (E.D. Ark. 1980) (decision under prior law).

Cited: *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964); *Richardson v. United States*, 358 F. Supp. 994 (E.D. Ark. 1973); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994); *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decisions under prior law).

SUBPART 2

APPLICABILITY OF CHAPTER

SECTION.

4-9-109. Scope.

SECTION.

4-9-110. Security interests arising under chapter 2 or chapter 2A.

4-9-109. Scope.

(a) Except as otherwise provided in subsections (c) and (d), this chapter applies to:

(1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

- (2) an agricultural lien;
- (3) a sale of accounts, chattel paper, payment intangibles, qualified intangible property, or promissory notes;
- (4) a consignment;
- (5) a security interest arising under § 4-2-401, § 4-2-505, § 4-2-711(3), or § 4-2A-508(5), as provided in § 4-9-110; and
- (6) a security interest arising under § 4-4-210 or § 4-5-118.
- (b) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this chapter does not apply.
- (c) This chapter does not apply to the extent that:
 - (1) a statute, regulation, or treaty of the United States preempts this chapter; or
 - (2) the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under § 4-5-114.
- (d) This chapter does not apply to:
 - (1) a landlord's lien, other than an agricultural lien;
 - (2) a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but § 4-9-333 applies with respect to priority of the lien;
 - (3) an assignment of a claim for wages, salary, or other compensation of an employee;
 - (4) a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;
 - (5) an assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;
 - (6) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;
 - (7) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;
 - (8) a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but §§ 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds;
 - (9) an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;
 - (10) a right of recoupment or set-off, but:
 - (A) Section 4-9-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and
 - (B) Section 4-9-404 applies with respect to defenses or claims of an account debtor;
 - (11) the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:
 - (A) liens on real property in §§ 4-9-203 and 4-9-308;
 - (B) fixtures in § 4-9-334;

(C) fixture filings in §§ 4-9-501, 4-9-502, 4-9-512, 4-9-516, and 4-9-519; and

(D) security agreements covering personal and real property in § 4-9-604;

(12) an assignment of a claim arising in tort, other than a commercial tort claim, but §§ 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds;

(13) an assignment of a deposit account in a consumer transaction, but §§ 4-9-315 and 4-9-322 apply with respect to proceeds and priorities in proceeds; or

(14) a transfer by a government or governmental unit.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

In general.

Applicability.

Attachment sales.

Chattel mortgages.

Improvement districts.

Insurance.

Judgments and causes of action.

Landlord's liens.

Notes subsequent to judgment.

Secured transactions.

In General.

Former § 4-9-104 reinforces the conclusion that the law of Arkansas recognizes a mortgage of rent as a thing separate and distinct from a mortgage of land alone. *First Fed. Sav. v. City Nat'l Bank*, 87 Bankr. 565 (W.D. Ark. 1988) (decision under prior law).

Applicability.

This section provides that the Uniform Commercial Code applies to conditional sales contracts and chattel mortgages and has the effect of relieving the court of the burden of construing instruments as either one or the other. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964) (decision under prior law).

This chapter, covering secured transactions, does not apply to real property or the creation of a real estate mortgage; it instead provides for the regulation of security interests in personal property and fixtures. *Arkansas Iron & Metal Co. v. First Nat'l Bank*, 16 Ark. App. 245, 701 S.W.2d 380 (1985) (decision under prior law).

The pre-2001 version of this chapter, covering secured transactions, does not apply to real property or the creation of a real estate mortgage; it instead provides for the regulation of security interests in personal property and fixtures. *Arkansas Iron & Metal Co. v. First Nat'l Bank*, 16 Ark. App. 245, 701 S.W.2d 380 (1985) (decision under prior law).

Where secured party chose to commence separate actions against the personal property collateral and the real property collateral of the guarantor, former subsection (j) was not applicable because personal property was also involved, and the secured party was required to act in accordance with the notice requirements of the pre-2001 version of the Arkansas Commercial Code. *United States v. Dawson*, 929 F.2d 1336 (8th Cir. 1991) (decision under prior law).

Attachment Sales.

This chapter does not apply to attachment sales pursuant to a judgment, by virtue of this section and former § 4-9-104(h). *Citizens Bank v. Perrin & Sons*, 253 Ark. 639, 488 S.W.2d 14 (1972) (decision under prior law).

This chapter does not apply to attachment sales pursuant to a judgment, by virtue of former § 4-9-102(2) and this section. *Citizens Bank v. Perrin & Sons*, 253 Ark. 639, 488 S.W.2d 14 (1972) (decision under prior law).

Chattel Mortgages.

A chattel mortgage is a secured transaction within the meaning of this subtitle. *Lonoke Prod. Credit Ass'n v. Bohannon*,

238 Ark. 206, 379 S.W.2d 17 (1964) (decision under prior law).

A chattel mortgage, as between the parties, is a secured transaction within the meaning of the Uniform Commercial Code. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

Improvement Districts.

Because former subsection (e) of this section excepts from the operations of this chapter a transfer by a government or governmental subdivision or agency, this chapter is inapplicable to improvement districts. *Quapaw Cent. Bus. Imp. Dist. v. Bond-Kinman, Inc.*, 315 Ark. 703, 870 S.W.2d 390 (1994) (decision under prior law).

Insurance.

Assignment of unearned premiums and dividends to insurance premium financing company was a transaction exempt from the filing requirements of the pre-2001 version of this chapter. *Premium Fin. Specialists, Inc. v. Lindsey*, 11 Bankr. 135 (E.D. Ark. 1981) (decision under prior law).

Judgments and Causes of Action.

Section 16-65-120, which relates specifically to the sale and assignment of judgments and causes of action, was not impliedly repealed by enactment of former § 4-9-102 and was the applicable local law. *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464 (8th Cir. 1985) (decision under prior law).

Landlord's Liens.

A lien set out in a lease does not become a "landlord's lien" under this section by virtue of the fact that the relationship of landlord and tenant exists between the parties. *In re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965) (decision under prior law).

Former subsection (b) of this section specifically excludes landlord's liens. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993) (decision under prior law).

Notes Subsequent to Judgment.

Where judgment was obtained upon a note subsequent to its surrender by a bank which had held it as security for a loan, UCC did not apply after date of that

judgment. *McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972) (decision under prior law).

Secured Transactions.

Factors which distinguish a lease from a secured transaction include: (1) whether the financing agent is also a manufacturer or dealer; (2) whether a down payment is required; (3) whether the lessee must bear the risk of loss; (4) whether the lessee has an option to purchase at the end of the lease term and, if so, whether the purchase may be for little or no additional consideration; (5) whether the lessor, upon the lessee's default under the lease, has a right to declare all lease payments due and payable (similar to a mortgagee's foreclosure rights); (6) whether the lessee must pay sales taxes; (7) whether financing statements or additional security instruments are completed regarding the transaction; and (8) whether a sales price for the purchase was established at the outset of the lease. Thus agreement was not a lease, but a conditional sales contract and a secured transaction, where the agreement provided for a down payment at the start of the "lease", the weekly payments included sales tax of approximately the current Arkansas sales tax rate, all risk of loss fell upon the "lessee", the "lessee" was expressly provided an option to purchase which could be exercised only at a specific time, and, in the lease, the purchase price for the option was established at the outset, which precluded consideration of the actual fair market value of the television at the end of the term. *In re Brown*, 82 Bankr. 68 (Bankr. W.D. Ark. 1987) (decision under prior law).

Cited: *Bond v. Dudley*, 244 Ark. 568, 426 S.W.2d 780 (1968); *In re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965); *Benton State Bank v. Warren*, 263 Ark. 1, 562 S.W.2d 74 (1978); *Rex Fin. Corp. v. Marshall*, 406 F. Supp. 567 (W.D. Ark. 1976); *Bell v. Itek Leasing Corp.*, 262 Ark. 22, 555 S.W.2d 1 (1977); *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964); *National Bedding & Furn. Indus., Inc. v. Clark*, 252 Ark. 780, 481 S.W.2d 690 (1972); *Bragg's Elec. Constr. Co. v. Rebsamen Cos.*, 6 Bankr. 619 (Bankr. E.D. Ark. 1980); *Womack v. Newman Fixture Co.*, 27 Ark.

App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990); Pachter, Gold & Schaffer v. Yantis, 742 F. Supp. 544 (W.D. Ark. 1990); Luker v. Reeves, 65 F.3d 670 (8th Cir. 1995) (decisions under prior law).

4-9-110. Security interests arising under chapter 2 or chapter 2A.

A security interest arising under § 4-2-401, § 4-2-505, § 4-2-711(3), or § 4-2A-508(5) is subject to this chapter. However, until the debtor obtains possession of the goods:

- (1) the security interest is enforceable, even if § 4-9-203(b)(3) has not been satisfied;
- (2) filing is not required to perfect the security interest;
- (3) the rights of the secured party after default by the debtor are governed by chapter 2 or chapter 2A; and
- (4) the security interest has priority over a conflicting security interest created by the debtor.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Cited: Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Cullipher v. Lindsey Rice Mill, Inc., 730 F. Supp. 970 (W.D. Ark. 1990) (decisions under prior law).

PART 2 — EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. Sufficiency of debtor's signature on security agreement or financing statement under UCC § 9-203 and § 9-402. 3 ALR 4th 502.

Improper sale, removal, concealment, or disposal of property subject to security interest under UCC. 48 ALR 4th 819.

Am. Jur. 68A Am. Jur. 2d, Secured Trans., § 123 et seq.

69 Am. Jur. 2d, Secured Trans., § 269 et seq.

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Laurence, The Shortest Article Ever on

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Ark. L. Rev. Secured Transactions: Article IX: Part 2, 16 Ark. L. Rev. 131.

McDermott, Standard Leasing Corp. v. Schmidt Aviation: Analysis of Contract Choice of Law in Usury Cases, 34 Ark. L. Rev. 297.

Leflar, Conflict of Laws: Arkansas, 1978-82, 36 Ark. L. Rev. 191.

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C.J.S. 79 C.J.S. Supp., Secured Trans., § 8 et seq.

UALR L.J. Martin, An Arkansas Practitioner's Guide to Perfecting Security Interests in Securities, Brokerage Accounts, and Other Forms of Investment Property under Revised Article 8 and Amended Article 9, 19 UALR L.J. 1.

Tyler, Survey of Business Law, 3 UALR L.J. 149.

Adams, "Clear Title" for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

Survey, Debtor/Creditor Relations, 14 UALR L.J. 353.

SUBPART 1

EFFECTIVENESS AND ATTACHMENT

SECTION.

4-9-201. General effectiveness of security agreement.

4-9-202. Title to collateral immaterial.

4-9-203. Attachment and enforceability of security interest — Proceeds — Supporting obligations — Formal requisites.

SECTION.

4-9-204. After-acquired property — Future advances.

4-9-205. Use or disposition of collateral permissible.

4-9-206. Security interest arising in purchase or delivery of financial asset.

4-9-201. General effectiveness of security agreement.

(a) Except as otherwise provided in the Uniform Commercial Code, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) A transaction subject to this chapter is subject to any applicable rule of law which establishes a different rule for consumers; to any other statute or regulation of this state that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit; to rights for workers' compensation as provided in § 11-9-110(a); and to any consumer-protection statute or regulation of this State.

(c) In case of conflict between this chapter and a rule of law, statute, or regulation described in subsection (b), the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) has only the effect the statute or regulation specifies.

(d) This chapter does not:

(1) validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in subsection (b); or

(2) extend the application of the rule of law, statute, or regulation to a transaction not otherwise subject to it.

History. Acts 2001, No. 1439, § 1.

Cross References. Artists' Consignment Act, § 4-73-201 et seq.

CASE NOTES

ANALYSIS

Unperfected interests.
Usury.

Unperfected Interests.

The UCC provides some protection to holders of unperfected interests by making such interest enforceable as between the parties. *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972), cert. denied, 410 U.S. 909, 93 S. Ct. 963, 35 L. Ed. 2d 270 (1973) (decision under prior law).

Usury.

Uniform Commercial Code does not af-

fect the Arkansas law on usury. *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 364 S.W.2d 158 (1963) (decision under prior law).

Cited: *Lyles v. Union Planters Nat'l Bank*, 239 Ark. 738, 393 S.W.2d 867 (1965); *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972); *Wilkins v. M & H Fin., Inc.*, 476 F. Supp. 212 (E.D. Ark. 1979), aff'd, 621 F.2d 311 (8th Cir. 1980); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994) (decisions under prior law).

4-9-202. Title to collateral immaterial.

Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, payment intangibles, or promissory notes, the provisions of this chapter with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

In General.

The UCC focuses on rights and duties of the secured party, the debtor, and third parties, rather than on the location of

title. *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972), cert. denied, 410 U.S. 909, 93 S. Ct. 963, 35 L. Ed. 2d 270 (1973) (decision under prior law).

4-9-203. Attachment and enforceability of security interest — Proceeds — Supporting obligations — Formal requisites.

(a) A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) value has been given;
- (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
- (3) one (1) of the following conditions is met:

(A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) the collateral is not a certificated security and is in the possession of the secured party under § 4-9-313 pursuant to the debtor's security agreement;

(C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under § 4-8-301 pursuant to the debtor's security agreement; or

(D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under § 4-9-104, § 4-9-105, § 4-9-106, or § 4-9-107 pursuant to the debtor's security agreement.

(c) Subsection (b) is subject to § 4-4-210 on the security interest of a collecting bank, § 4-5-118 on the security interest of a letter-of-credit issuer or nominated person, § 4-9-110 on a security interest arising under chapter 2 or chapter 2A, and § 4-9-206 on security interests in investment property.

(d) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this chapter or by contract:

(1) the security agreement becomes effective to create a security interest in the person's property; or

(2) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) the agreement satisfies subsection (b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) another agreement is not necessary to make a security interest in the property enforceable.

(f) The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by § 4-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

CASE NOTES

ANALYSIS

In general.
 Description of collateral.
 Duty of care.
 Failure to create security interest.
 Forged security agreements.
 Identification of debtor.
 Incorporation of debtor.
 Lien encumbrancers.
 Rights in collateral.
 Unperfected title holders.
 Value given.

In General.

For a creditor to have a perfected security interest in personal property, several requirements must be met under the pre-2001 version of this chapter: the debtor must have rights in the collateral; the debtor must sign a security agreement, which contains a description of the collateral, in favor of the secured party; and value must be given between the debtor and the secured party. *Rice v. Fas Fax Corp.* (In re Hot Shots Burgers & Fries, Inc.), 169 Bankr. 920 (Bankr. E.D. Ark. 1994) (decision under prior law).

A financing statement, standing alone, does not create a security interest in the debtor's property under the pre-2001 version of this chapter. *Rice v. Citizens First Bank* (In re Cheqnet Sys.), 227 Bankr. 166 (Bankr. E.D. Ark. 1998) (decision under prior law).

A note may constitute a security agreement because it grants a security interest, contains a description of the collateral, and is signed by the debtor; however, if the note is the security agreement, the bank's security is that collateral described in the note, and neither the composite document rule nor the parole evidence rule under the pre-2001 version of this chapter will apply to expand the items of collateral securing the note or to correct any error in the granting language of the security agreement. *Rice v. Citizens First Bank* (In re Cheqnet Sys.), 227 Bankr. 166 (Bankr. E.D. Ark. 1998) (decision under prior law).

Description of Collateral.

Security agreements and financing statements establishing liens on growing crops were insufficient to identify the subject of the security agreements. *Piggott State Bank v. Pollard Gin Co.*, 243 Ark.

159, 419 S.W.2d 120 (1967) (decision under prior law).

It made no difference that the security agreement stated the subject automobile was a Buick Electra when the automobile surrendered under the default was a Buick LeSabre. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

This section and former § 4-9-402(1) clearly require some type of a description of the land concerned, and a description in a combined financing statement and security agreement which omitted several parcels of land, was insufficient as to the real estate not described. *People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972) (decision under prior law).

Duty of Care.

Where creditor failed to satisfy the requirements of former § 4-9-203 by omitting the signature of the debtor and by not providing a sufficient description of the land on which the crops were to be grown, creditor's security interest in debtor's goods did not attach, and, as the holder of an unattached security interest, creditor could not claim or enforce any duty of care that this chapter may place on a purchaser of farm products in the ordinary course of business. *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994) (decision under prior law).

Failure to Create Security Interest.

Possession of tractor by alleged secured party was actually held pursuant to a sale and not a pledge even though a financing statement was filed where no security agreement was executed and alleged secured party did not take possession of the tractor at the time the financing statement was executed. *Gibbs v. King*, 263 Ark. 338, 564 S.W.2d 515 (1978) (decision under prior law).

Under the pre-2001 version of the U.C.C., an agent may not create a valid security interest by wrongfully converting the principal's property, even if the agent's creditors acted in good faith. *Pachter, Gold & Schaffer v. Yantis*, 742 F. Supp. 544 (W.D. Ark. 1990) (decision under prior law).

Forged Security Agreements.

The assignee of a forged security agreement from a creditor of doubtful solvency who failed to verify the debtor's signature could not assert estoppel against the holder of a genuine security agreement because of such holder's failure to file notice of its security interest. *General Elec. Credit Corp. v. Bankers Com. Corp.*, 244 Ark. 984, 429 S.W.2d 60 (1968) (decision under prior law).

Identification of Debtor.

The language of former § 4-9-402(7) regarding the sufficiency name of the debtor on a filing cannot properly be construed to dispense with the specific requirements of subsection (1) of this section because former § 4-9-402(7) assumes the existence of a security interest to perfect. *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decision under prior law).

Incorporation of Debtor.

Where bank held security interest in the assets, both current and after-acquired, of debtors' business and debtors' subsequently incorporated, but the bank failed to obtain a new security agreement or financing statement in the name of the corporation, and no facts were shown to warrant disregarding the corporate entity, the bank had no security interest in property acquired after incorporation under the pre-2001 version of this chapter, and lender who funded purchase of new inventory after incorporation had valid first lien in new inventory. *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decision under prior law).

Lien Encumbrancers.

Having failed to comply with § 27-14-801 et seq., a creditor was not a lien encumbrancer in so far as third parties were concerned under the motor vehicle registration requirements when another creditor took possession of the subject automobile. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

Rights in Collateral.

Mere possession of a letter of credit is insufficient to establish a right to collateral upon which to base a security interest. *Tradax Am., Inc. v. First Nat'l Bank*,

934 F.2d 969 (8th Cir. 1991) (decision under prior law).

The fact the defendant booked the transaction as an account receivable did not make it an account receivable in law, where the defendant did not own, and could not legitimately encumber, any interest in the account, regardless of the bookkeeping procedure he chose. *Tradax Am., Inc. v. First Nat'l Bank*, 934 F.2d 969 (8th Cir. 1991) (decision under prior law).

Debtor had rights in the collateral under the pre-2001 version of this chapter at the time he took possession and began operating the business, and the security interest of the supplier attached even though sale to debtor was not completed until a later date. *Wawak v. Affiliated Food Stores, Inc.*, 306 Ark. 186, 812 S.W.2d 679 (1991) (decision under prior law).

Unperfected Title Holders.

Where a creditor was neither a lien encumbrancer, in so far as third parties are concerned, under the Motor Vehicle Registration Act, nor the holder of a perfected security interest, a "lien creditor" or a buyer in the ordinary course of business under the Uniform Commercial Code, even though it held the title its security interest did not have priority over the security interest another creditor had perfected by possession. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

Value Given.

Where the parent corporation promised to extend credit to a bankrupt moving company's sole shareholder, who executed a security agreement in favor of the parent corporation pledging all of the assets of the bankrupt company, there was consideration sufficient under the pre-2001 version of this chapter to support a simple contract and therefore the secured interest of the assignee of the security agreement was valid, and the fact that the benefit of the security agreement accrued to the sole stockholder and not the bankrupt company did not detract from the fact that the secured party gave value for the security interest. *Putnam Realty, Inc. v. Terminal Moving & Storage Co.*, 631 F.2d 547 (8th Cir. 1980) (decision under prior law).

Cited: *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964); *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972); *Richardson v. United States*, 358 F. Supp. 994 (E.D. Ark. 1973); *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980); *Findley Mach. Co. v. Miller*, 3 Ark. App. 264, 625 S.W.2d 542 (1981); *Davidson v. Arkansas River Valley Drain Drying Coop. (In re Glass)*, 26 Bankr. 166 (E.D. Ark. 1982); *Tradax Am., Inc. v. First Nat'l Bank (In re Howell Enters., Inc.)*, 105 Bankr. 494 (Bankr. E.D.

Ark. 1989); *Cullipher v. Lindsey Rice Mill, Inc.*, 730 F. Supp. 970 (W.D. Ark. 1990); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990); *First State Bank v. Miller*, 119 Bankr. 660 (W.D. Ark. 1990); *Schieffler v. First Nat'l Bank (In re Peeler)*, 145 Bankr. 973 (Bankr. E.D. Ark. 1992); *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993) (decisions under prior law).

4-9-204. After-acquired property — Future advances.

(a) Except as otherwise provided in subsection (b), a security agreement may create or provide for a security interest in after-acquired collateral.

(b) A security interest does not attach under a term constituting an after-acquired property clause to:

(1) consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within ten (10) days after the secured party gives value; or

(2) a commercial tort claim.

(c) A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Attachment of security interests.

Chattel mortgages.

Priority of liens.

Attachment of Security Interests.

A security interest such as a chattel mortgage attaches when it has been executed, the secured creditor has given value, and the debtor has acquired some interest in the collateral which he can encumber. *Lonoke Prod. Credit Ass'n v. Bohannon*, 238 Ark. 206, 379 S.W.2d 17 (1964) (decision under prior law).

The creditor's security interest in an account receivable attached with the transfer of the account where no question was raised as to the agreement between the debtor and creditor concerning the transfer, as to value given or as to the debtor's rights in the collateral. *Standard*

Lumber Co. v. Chamber Frames, Inc., 317 F. Supp. 837 (E.D. Ark. 1970) (decision under prior law).

Chattel Mortgages.

As between the parties, former §§ 4-9-204 — 4-9-206 control the validity and enforcement of a chattel mortgage. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

Priority of Liens.

Properly perfected materialmen's liens took priority over the attached but unperfected lien of the supplier of an air conditioning unit, cooling tower, kitchen range and oven, and duct work in such goods only to the extent that labor or material was supplied after such goods became fixtures. *House v. Long*, 244 Ark.

718, 426 S.W.2d 814 (1968) (decision under prior law).

Where a bank loaned money with a financing statement and chattel mortgage covering future advances being filed, and subsequently others loaned debtor money acquiring liens, the bank had first priority when the debtor failed to meet payments and its property had to be sold, notwithstanding the debtor had payed off the first loan to bank, since it never was out of debt to bank. *Associated Bus. Inv. Corp. v. First Nat'l Bank*, 264 Ark. 611, 573 S.W.2d 328 (1978) (decision under prior law).

Cited: *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972); *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981); *Tradax Am., Inc. v. First Nat'l Bank (In re Howell Enters., Inc.)*, 105 Bankr. 494 (Bankr. E.D. Ark. 1989); *Beebe v. MacMillan Petro. (Ark.), Inc.*, 115 Bankr. 175 (Bankr. W.D. Ark. 1990); *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993); *In re Russell*, 165 Bankr. 262 (Bankr. E.D. Ark. 1994) (decisions under prior law).

4-9-205. Use or disposition of collateral permissible.

(a) A security interest is not invalid or fraudulent against creditors solely because:

(1) the debtor has the right or ability to:

(A) use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods;

(B) collect, compromise, enforce, or otherwise deal with collateral;

(C) accept the return of collateral or make repossessions; or

(D) use, commingle, or dispose of proceeds; or

(2) the secured party fails to require the debtor to account for proceeds or replace collateral.

(b) This section does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends upon possession of the collateral by the secured party.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Chattel Mortgages.

As between the parties, §§ 4-9-204 — 4-9-206 control the validity and enforcement of a chattel mortgage. *Anderson v.*

First Jacksonville Bank, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

4-9-206. Security interest arising in purchase or delivery of financial asset.

(a) A security interest in favor of a securities intermediary attaches to a person's security entitlement if:

(1) the person buys a financial asset through the securities intermediary in a transaction in which the person is obligated to pay the purchase price to the securities intermediary at the time of the purchase; and

(2) the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary.

(b) The security interest described in subsection (a) secures the person's obligation to pay for the financial asset.

(c) A security interest in favor of a person that delivers a certificated security or other financial asset represented by a writing attaches to the security or other financial asset if:

(1) the security or other financial asset:

(A) in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment; and

(B) is delivered under an agreement between persons in the business of dealing with such securities or financial assets; and

(2) the agreement calls for delivery against payment.

(d) The security interest described in subsection (c) secures the obligation to make payment for the delivery.

History. Acts 2001, No. 1439, § 1.

SUBPART 2

RIGHTS AND DUTIES

SECTION.

4-9-207. Rights and duties of secured party having possession or control of collateral.

4-9-208. Additional duties of secured party having control of collateral.

4-9-209. Duties of secured party if ac-

SECTION.

count debtor has been notified of assignment.

4-9-210. Request for accounting — Request regarding list of collateral or statement of account.

4-9-207. Rights and duties of secured party having possession or control of collateral.

(a) Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Except as otherwise provided in subsection (d), if a secured party has possession of collateral:

(1) reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) the risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) the secured party may use or operate the collateral:

(A) for the purpose of preserving the collateral or its value;

(B) as permitted by an order of a court having competent jurisdiction; or

(C) except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Except as otherwise provided in subsection (d), a secured party having possession of collateral or control of collateral under § 4-9-104, § 4-9-105, § 4-9-106, or § 4-9-107:

(1) may hold as additional security any proceeds, except money or funds, received from the collateral;

(2) shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) may create a security interest in the collateral.

(d) If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) subsection (a) does not apply unless the secured party is entitled under an agreement:

(A) to charge back uncollected collateral; or

(B) otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) subsections (b) and (c) do not apply.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Commercially reasonable resale.
Possession.

Commercially Reasonable Resale.

Where a secured party filed a replevin action to recover the collateral farming equipment and to obtain a deficiency judgment, the trial court erred in finding that the resale of the equipment was commercially reasonable under the pre-2001 version of this chapter, in view of the fact that the debtor was prevented from presenting evidence of commercial reasonableness of the equipment at the time of the sale, and the fact that the secured party did not give

notice of the sale of the possessed items of property. *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982) (decision under prior law).

Possession.

The term "possession" in former § 4-9-207 requires more than the bare right to repossess the collateral; possession involves some level of physical control over the collateral. *City Nat'l Bank v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995) (decision under prior law).

Cited: *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968) (decisions under prior law).

4-9-208. Additional duties of secured party having control of collateral.

(a) This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within ten (10) days after receiving an authenticated demand by the debtor:

(1) a secured party having control of a deposit account under § 4-9-104(a)(2) shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from

any further obligation to comply with instructions originated by the secured party;

(2) a secured party having control of a deposit account under § 4-9-104(a)(3) shall:

(A) pay the debtor the balance on deposit in the deposit account; or

(B) transfer the balance on deposit into a deposit account in the debtor's name;

(3) a secured party, other than a buyer, having control of electronic chattel paper under § 4-9-105 shall:

(A) communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

(B) if the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;

(4) a secured party having control of investment property under § 4-8-106(d)(2) or § 4-9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party; and

(5) a secured party having control of a letter-of-credit right under § 4-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party.

History. Acts 2001, No. 1439, § 1.

4-9-209. Duties of secured party if account debtor has been notified of assignment.

(a) Except as otherwise provided in subsection (c), this section applies if:

(1) there is no outstanding secured obligation; and

(2) the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Within ten (10) days after receiving an authenticated demand by the debtor, a secured party shall send to an account debtor that has received notification of an assignment to the secured party as assignee

under § 4-9-406(a) an authenticated record that releases the account debtor from any further obligation to the secured party.

(c) This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible.

History. Acts 2001, No. 1439, § 1.

4-9-210. Request for accounting — Request regarding list of collateral or statement of account.

(a) In this section:

(1) “Request” means a record of a type described in paragraph (2), (3), or (4).

(2) “Request for an accounting” means a record authenticated by a debtor requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request.

(3) “Request regarding a list of collateral” means a record authenticated by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request.

(4) “Request regarding a statement of account” means a record authenticated by a debtor requesting that the recipient approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) Subject to subsections (c), (d), (e), and (f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within fourteen (14) days after receipt:

(1) in the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and

(2) in the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

(c) A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may comply with a request regarding a list of collateral by sending to the debtor an authenticated record including a statement to that effect within fourteen (14) days after receipt.

(d) A person that receives a request regarding a list of collateral, claims no interest in the collateral when it receives the request, and claimed an interest in the collateral at an earlier time shall comply with the request within fourteen (14) days after receipt by sending to the debtor an authenticated record:

(1) disclaiming any interest in the collateral; and

(2) if known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within fourteen (14) days after receipt by sending to the debtor an authenticated record:

(1) disclaiming any interest in the obligations; and

(2) if known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) A debtor is entitled without charge to one response to a request under this section during any six-month period. The secured party may require payment of a charge not exceeding twenty-five dollars (\$25) for each additional response.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Cited: Associated Bus. Inv. Corp. v. First Nat'l Bank, 264 Ark. 611, 573 S.W.2d 328 (1978) (decisions under prior law).

PART 3 — PERFECTION AND PRIORITY

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Cross References. Perfection of security interest, savings clause, in all securities, § 4-8-603.

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Construction of UCC § 9-307(3) providing that under certain conditions a buyer, other than a buyer in the ordinary course of business, takes free of a security interest securing "future advances". 35 ALR 4th 390.

Authorization to transfer collateral free of lien under UCC § 9-306(2). 37 ALR 4th 787.

Improper sale, removal, concealment, or disposal of property subject to security interest under the UCC. 48 ALR 4th 819.

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SUBPART 1

LAW GOVERNING PERFECTION AND PRIORITY

SECTION.

4-9-301. Law governing perfection and priority of security interests.

4-9-302. Law governing perfection and priority of agricultural liens.

4-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.

4-9-304. Law governing perfection and

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priority of security interests in deposit accounts.

4-9-305. Law governing perfection and priority of security interests in investment property.

4-9-306. Law governing perfection and priority of security interests in letter-of-credit rights.

4-9-307. Location of debtor.

4-9-301. Law governing perfection and priority of security interests.

Except as otherwise provided in §§ 4-9-303 — 4-9-306, and except for the perfection, the effect of perfection or nonperfection, and the priority of a security interest in qualified intangible property, which shall be governed by the law of this state, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) perfection of a security interest in the goods by filing a fixture filing;

(B) perfection of a security interest in timber to be cut; and

(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

In general.
Construction.
Purpose.
Effect of lapsed filing.
Foreign titles.
Purchasers of farm products.
Vendor's lien.

In General.

Former § 4-9-103 applied without regard to the debtor's residence, business address, or where the security agreement attached. *Meeks v. Mercedes-Benz Credit Corp.* (In re Stinnett), 241 Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

Construction.

Although several provisions of Arkansas law may appear to conflict, a harmonious reading of the provisions of the Arkansas vehicle titling statutes and the pre-2001 version of the Uniform Commercial Code clearly demonstrates that it is the intention of the statutes to allow the security interest in a vehicle perfected in a state other than Arkansas, by required notation on a certificate of title issued by that state, to remain perfected in Arkansas for a period of four months, and so long thereafter as no certificate of title is issued by Arkansas. *Meeks v. Mercedes-Benz Credit Corp.* (In re Stinnett), 241

Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

Purpose.

The purpose of the pre-2001 version of the commercial code is to promote the uniform recognition of security interests which have been noted on the certificate of title, and to provide notice to potential purchasers or creditors that the property is encumbered. *Meeks v. Mercedes-Benz Credit Corp.* (In re Stinnett), 241 Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

Effect of Lapsed Filing.

A bank, rather than a judgment creditor, had priority with respect to objects of personal property, notwithstanding that the bank did not file a continuation statement when its security interest expired and that the judgment creditor obtained its judgment after the original filing by the bank, since the judgment creditor was not a purchaser or lien creditor within the meaning of the pre-2001 statute. *J-M Mfg. Co. v. First Nat'l Bank of Dewitt*, 70 Ark. App. 60, 14 S.W.3d 534 (2000) (decision under prior law).

Foreign Titles.

The security interest that was properly noted on a currently effective foreign title also effective under the pre-2001 version of Arkansas law, was entitled to deference by the laws of the State of Arkansas.

Meeks v. Mercedes-Benz Credit Corp. (In re Stinnett), 241 Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

Purchasers of Farm Products.

Where a purchaser paid consideration and took delivery of a motor home several months before Louisiana and Arkansas issued the certificates of title that failed to show the bank's lien, the purchaser could not be considered a bona fide purchaser because he did not purchase relying on any certificate of title, since to allow him to retain the vehicle would defeat the general policy involved in certificate of title laws, which is that lien holders and third parties should be able to rely upon certificates of title. Commercial Nat'l Bank v. McWilliams, 270 Ark. 826, 606 S.W.2d 363 (1980) (decision under prior law).

An auctioneer is merely a selling agent, not a "purchaser," and cannot claim the protection given to buyers of farm products in the ordinary course of business; accordingly, auctioneer who sold cattle in which bank had security interest to a buyer in another state was not a purchaser having priority over bank so as to

avoid liability for conversion. Commercial Bank v. Hales, 281 Ark. 439, 665 S.W.2d 857 (1984) (decision under prior law).

Vendor's Lien.

Where the chancery court ordered the sale of a truck to satisfy a repairman's lien, but the truck had been subject to a finance company's perfected security interest when brought into the state, the interest acquired by the buyer at the judicial sale was subject to the finance company's vendor's lien, and a replevin action brought by the finance company was not a collateral attack on the chancery court order since the finance company was never made a party to that suit. Mack Fin. Corp. v. Chrestman, 270 Ark. 396, 605 S.W.2d 749 (1980) (decision under prior law).

The fact that the debtor may have avoided higher fees or taxes imposed by the State of Arkansas by registering and titling his vehicles in Oklahoma was of no consequence to the perfection question. Meeks v. Mercedes-Benz Credit Corp. (In re Stinnett), 241 Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

4-9-302. Law governing perfection and priority of agricultural liens.

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.

History. Acts 2001, No. 1439, § 1.

4-9-303. Law governing perfection and priority of security interests in goods covered by a certificate of title.

(a) This section applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

(b) Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction.

(c) The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by

a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Certificates of Title.

This section continues in force the perfection of a security interest noted on a foreign certificate of title until a certificate has been issued by another jurisdiction. *Strick Corp. v. Eldo-Craft Boat Co.*, 479 F. Supp. 720 (W.D. Ark. 1979) (decision under prior law).

It is the intention of this section and § 27-14-201 et seq. to allow the security interest in a vehicle perfected in a state other than Arkansas by required notation on a certificate of title issued by that state to remain perfected in this state for a period of four months, and so long thereafter as no certificate of title is issued by this state. *Strick Corp. v. Eldo-Craft Boat Co.*, 479 F. Supp. 720 (W.D. Ark. 1979) (decision under prior law).

When this section speaks of "registration," the language contemplates the issuance of an Arkansas title, not the procurement of a "nonnegotiable," "nontitle" registration in connection with the issuance of a vehicle license. *Strick Corp. v. Eldo-Craft Boat Co.*, 479 F. Supp. 720 (W.D. Ark. 1979) (decision under prior law).

Nowhere is there a requirement that vehicles must have been physically present when the certificates of titles perfecting the security interest were issued, only that the vehicles must have been in that jurisdiction when the security interest attached. *Strick Corp. v. Eldo-Craft Boat Co.*, 479 F. Supp. 720 (W.D. Ark. 1979) (decision under prior law).

Where the certificate of title was prop-

erly issued and perfected in Oklahoma in accord with Oklahoma law, and Oklahoma is a jurisdiction which permits titling of foreign vehicles, the security agreement was perfected under the pre-2001 version of Arkansas law. *Meeks v. Mercedes-Benz Credit Corp. (In re Stinnett)*, 241 Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

Although an Arkansas resident has a duty under Arkansas law to seek the issuance of certificates of title in the appropriate forum, the creditor has no obligation to make a filing in another state to perfect or reperfect its security interest, and the creditor's interest continues to be perfected despite a resident's failure to comply with the pre-2001 version of Arkansas registration laws. *Meeks v. Mercedes-Benz Credit Corp. (In re Stinnett)*, 241 Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

The fact that the debtor may have avoided higher fees or taxes imposed by the State of Arkansas by registering and titling his vehicles in Oklahoma is of no consequence to the perfection question, and the appropriate outcome for debtor's failure to comply with the pre-2001 version of Arkansas state law is not to punish the creditor, but if the state chooses to enforce the relevant provisions of Arkansas law, the appropriate and existing remedies are prosecution of the debtor. *Meeks v. Mercedes-Benz Credit Corp. (In re Stinnett)*, 241 Bankr. 599 (Bankr. W.D. Ark. 1999) (decision under prior law).

4-9-304. Law governing perfection and priority of security interests in deposit accounts.

(a) The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.

(b) The following rules determine a bank's jurisdiction for purposes of this part:

(1) If an agreement between the bank and the debtor governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this part, this chapter, or this subtitle, that jurisdiction is the bank's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(4) If none of the preceding paragraphs applies, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.

(5) If none of the preceding paragraphs applies, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located.

History. Acts 2001, No. 1439, § 1.

Cross References. Perfection of secu-

urity interest, savings clause, in all securities, § 4-8-603.

4-9-305. Law governing perfection and priority of security interests in investment property.

(a) Except as otherwise provided in subsection (c), the following rules apply:

(1) While a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

(2) The local law of the issuer's jurisdiction as specified in § 4-8-110(d) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security.

(3) The local law of the securities intermediary's jurisdiction as specified in § 4-8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account.

(4) The local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account.

(b) The following rules determine a commodity intermediary's jurisdiction for purposes of this part:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part, this chapter, or this subtitle, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) The local law of the jurisdiction in which the debtor is located governs:

- (1) perfection of a security interest in investment property by filing;
- (2) automatic perfection of a security interest in investment property created by a broker or securities intermediary; and
- (3) automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

History. Acts 2001, No. 1439, § 1.

rity interest, savings clause, in all securities, § 4-8-603.

Cross References. Perfection of secu-

4-9-306. Law governing perfection and priority of security interests in letter-of-credit rights.

(a) Subject to subsection (c), the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state.

(b) For purposes of this part, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in § 4-5-116.

(c) This section does not apply to a security interest that is perfected only under § 4-9-308(d).

History. Acts 2001, No. 1439, § 1.

4-9-307. Location of debtor.

(a) In this section, "place of business" means a place where a debtor conducts its affairs.

(b) Except as otherwise provided in this section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence.

(2) A debtor that is an organization and has only one (1) place of business is located at its place of business.

(3) A debtor that is an organization and has more than one (1) place of business is located at its chief executive office.

(c) Subsection (b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor is located in the District of Columbia.

(d) A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by subsections (b) and (c).

(e) A registered organization that is organized under the law of a state is located in that state.

(f) Except as otherwise provided in subsection (i), a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located:

(1) in the state that the law of the United States designates, if the law designates a state of location;

(2) in the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location; or

(3) in the District of Columbia, if neither paragraph (1) nor paragraph (2) applies.

(g) A registered organization continues to be located in the jurisdiction specified by subsection (e) or (f) notwithstanding:

(1) the suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organization; or

(2) the dissolution, winding up, or cancellation of the existence of the registered organization.

(h) The United States is located in the District of Columbia.

(i) A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one (1) state.

(j) A foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent upon which service of process may be made on behalf of the carrier.

(k) This section applies only for purposes of this part.

History. Acts 2001, No. 1439, § 1. 1958, referred to in this section, is codified
U.S. Code. The Federal Aviation Act of primarily as 49 U.S.C. § 1301 et seq.

SUBPART 2

PERFECTION

SECTION.

4-9-308. When security interest or agricultural lien is perfected — Continuity of perfection.

4-9-309. Security interest perfected upon attachment.

4-9-310. When filing required to perfect security interest or agricultural lien — Security interests and agricultural liens to which filing provisions do not apply.

4-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.

4-9-312. Perfection of security interests in chattel paper, deposit accounts, documents,

SECTION.

goods covered by documents, instruments, investment property, letter-of-credit rights, and money — Perfection by permissive filing — Temporary perfection without filing or transfer of possession.

4-9-313. When possession by or delivery to secured party perfects security interest without filing.

4-9-314. Perfection by control.

4-9-315. Secured party's rights on disposition of collateral and in proceeds.

4-9-316. Continued perfection of security interest following change in governing law.

4-9-308. When security interest or agricultural lien is perfected — Continuity of perfection.

(a) Except as otherwise provided in this section and § 4-9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in §§ 4-9-310 — 4-9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.

(b) An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection in § 4-9-310 have been satisfied. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective.

(c) A security interest or agricultural lien is perfected continuously if it is originally perfected by one (1) method under this chapter and is later perfected by another method under this chapter, without an intermediate period when it was unperfected.

(d) Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

(e) Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right.

(f) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.

(g) Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Chattel mortgages.
Continuous perfection.

Chattel Mortgages.

Sections 4-9-301 — 4-9-304 concern priorities of perfected and unperfected security interests as against third persons and are not applicable to a chattel mortgage as between the parties. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

Continuous Perfection.

To interpret former § 4-9-303(2) as providing that a security interest can be continuously perfected by consecutively filed financing statements contradicts the express language of former § 4-9-403(2).

Former § 4-9-303(2) is applicable to security interests that are originally perfected in one way and then subsequently perfected in some other way, without an intermediate unperfected period. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

Cited: *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964); *Standard Lumber Co. v. Chamber Frames, Inc.*, 317 F. Supp. 837 (E.D. Ark. 1970); *Tradax Am., Inc. v. First Nat'l Bank (In re Howell Enters., Inc.)*, 105 Bankr. 494 (Bankr. E.D. Ark. 1989); *Wawak v. Affiliated Food Stores, Inc.*, 306 Ark. 186, 812 S.W.2d 679 (1991); *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993) (decisions under prior law).

4-9-309. Security interest perfected upon attachment.

The following security interests are perfected when they attach:

(1) a purchase-money security interest in consumer goods, except as otherwise provided in § 4-9-311(b) with respect to consumer goods that are subject to a statute or treaty described in § 4-9-311(a);

(2) an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

(3) a sale of a payment intangible;

(4) a sale of a promissory note;

(5) a security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services;

(6) a security interest arising under § 4-2-401, § 4-2-505, § 4-2-711(3), or § 4-2A-508(5), until the debtor obtains possession of the collateral;

(7) a security interest of a collecting bank arising under § 4-4-210;

(8) a security interest of an issuer or nominated person arising under § 4-5-118;

(9) a security interest arising in the delivery of a financial asset under § 4-9-206(c);

(10) a security interest in investment property created by a broker or securities intermediary;

(11) a security interest in a commodity contract or a commodity account created by a commodity intermediary;

(12) an assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder; and

(13) a security interest created by an assignment of a beneficial interest in a decedent's estate.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Purchase money mortgages.

Purchase money security interest.

Purchase Money Mortgages.

A purchase money mortgage on farm machinery took priority over a properly filed financing statement and security agreement executed thereafter covering the same farm machinery although the purchase money mortgage was not filed until after the filing of the subsequent financing statement. *Lonoke Prod. Credit Ass'n v. Bohannon*, 238 Ark. 206, 379 S.W.2d 17 (1964) (decision under prior law).

Purchase Money Security Interest.

Where in the written purchase agree-

ment between the parties, the defendant buyer affirmatively and unambiguously represented to the plaintiff seller that he was purchasing the collateral goods for personal, family, or household purposes and the buyer did not inform the seller that the goods were to be used in his rental property business, considerations of fairness under the pre-2001 version of this chapter dictated that the seller's security interest be regarded as a purchase money security interest in consumer goods and, therefore, perfected without the filing of any financing statement. *Sears, Roebuck & Co. v. Pettit*, 18 Bankr. 8 (Bankr. E.D. Ark. 1981) (decision under prior law).

4-9-310. When filing required to perfect security interest or agricultural lien — Security interests and agricultural liens to which filing provisions do not apply.

(a) Except as otherwise provided in subsection (b) and § 4-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) The filing of a financing statement is not necessary to perfect a security interest:

- (1) that is perfected under § 4-9-308(d), (e), (f), or (g);
- (2) that is perfected under § 4-9-309 when it attaches;
- (3) in property subject to a statute, regulation, or treaty described in § 4-9-311(a);
- (4) in goods in possession of a bailee which is perfected under § 4-9-312(d)(1) or (2);
- (5) in certificated securities, documents, goods, or instruments which is perfected without filing or possession under § 4-9-312(e), (f), or (g);
- (6) in collateral in the secured party's possession under § 4-9-313;

(7) in a certificated security which is perfected by delivery of the security certificate to the secured party under § 4-9-313;

(8) in deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights which is perfected by control under § 4-9-314;

(9) in proceeds which is perfected under § 4-9-315; or

(10) that is perfected under § 4-9-316.

(c) If a secured party assigns a perfected security interest or agricultural lien, a filing under this chapter is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Assignment of accounts.

Chattel mortgages.

Conditional sale.

Conveyance in ordinary course of business.

Motor vehicles.

Possession of collateral.

Assignment of Accounts.

In an action by a creditor, to which debtor had assigned accounts receivable, to recover on the accounts, where total accounts receivable assigned represented approximately 16% of debtor's total outstanding accounts receivable, such assignment was not a significant part of debtor's accounts receivable and, thus, no financing statement was required to be filed to perfect a security interest. *Standard Lumber Co. v. Chamber Frames, Inc.*, 317 F. Supp. 837 (E.D. Ark. 1970) (decision under prior law).

An account receivable, constituting 14% of a bankrupt's total accounts receivable, was not a "significant part" within the meaning of subsection (1)(e) of this section. In re *B. Hollis Knight Co.*, 461 F. Supp. 1213 (E.D. Ark. 1978) (decision under prior law).

In determining what is a significant part of the outstanding accounts of the assignor, a court must examine all of the facts and circumstances surrounding the transaction, including the relative size of the assignment and whether it was casual or isolated. *Davidson v. Union Nat'l Bank*, 605 F.2d 397 (8th Cir. 1979) (decision under prior law).

Where the evidence established that out

of the amount listed by the contractor as accounts receivable, approximately 50 percent of this amount constituted retainage on construction contracts and, where, since the contractor did not complete its work on any projects after it filed bankruptcy, the retainage proved to be uncollectible due to various counterclaims and setoffs, the district court correctly included the retainage in the contractor's total outstanding accounts. *Davidson v. Union Nat'l Bank*, 605 F.2d 397 (8th Cir. 1979) (decision under prior law).

Chattel Mortgages.

Sections 4-9-301 — 4-9-304 concern priorities of perfected and unperfected security interests as against third persons and are not applicable to a chattel mortgage as between the parties. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

Conditional Sale.

Lease with a final option to purchase was a conditional sale and the lease was a security interest which should have been filed. In re *Shell*, 390 F. Supp. 273 (E.D. Ark. 1975) (decision under prior law).

Conveyance in Ordinary Course of Business.

When debtors conveyed their property to new corporation owned by debtors, bank's security interest in debtors' property or the proceeds from the sale of the property was not affected under the pre-2001 version of this chapter because the property was not conveyed to a buyer in the ordinary course of business. *Bank of*

Yellville v. Scott, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decision under prior law).

Motor Vehicles.

Where finance company did not file a chattel mortgage on an automobile, its security interest was not perfected, so that the trial court erred in holding the finance company's claim to be prior to that of a garage owner who had possession of the car due to an unpaid repair bill. *Henson v. Government Employees Fin. & Indus. Loan Corp.*, 257 Ark. 273, 516 S.W.2d 1 (1974) (decision under prior law).

Possession of Collateral.

Bank which surrendered possession of note which it held as security for a loan lost its security interest in the note. *McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972) (decision under prior law).

Cited: *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark.

1964); *Standard Lumber Co. v. Chamber Frames, Inc.*, 317 F. Supp. 837 (E.D. Ark. 1970); *In re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965); *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972); *Rex Fin. Corp. v. Marshall*, 406 F. Supp. 567 (W.D. Ark. 1976); *Findley Mach. Co. v. Miller*, 3 Ark. App. 264, 625 S.W.2d 542 (1981); *Davidson v. Arkansas River Valley Drain Drying Coop. (In re Glass)*, 26 Bankr. 166 (E.D. Ark. 1982); *GE Co. v. M & C Mfg., Inc.*, 283 Ark. 110, 671 S.W.2d 189 (1984); *Limerick v. Limerick (In re Answerfone, Inc.)*, 48 Bankr. 24 (Bankr. E.D. Ark. 1985); *Bassett v. Hobart Corp.*, 292 Ark. 592, 732 S.W.2d 133 (1987); *First Nat'l Bank v. Massachusetts Gen. Life Ins. Co.*, 296 Ark. 28, 752 S.W.2d 1 (1988); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989); *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993) (decisions under prior law).

4-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.

(a) Except as otherwise provided in subsection (d), the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt § 4-9-310(a);

(2) any other laws of this state which provide for central filing of security interests or which require indication on a certificate of title to property of such interest, including but not limited to §§ 27-14-801 — 27-14-807; or

(3) a certificate-of-title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.

(b) Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this chapter. Except as otherwise provided in subsection (d) and §§ 4-9-313 and 4-9-316(d) and (e) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.

(c) Except as otherwise provided in subsection (d) and § 4-9-316(d) and (e), duration and renewal of perfection of a security interest perfected by compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (a) are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to this chapter.

(d) During any period in which collateral subject to a statute specified in subdivision (a)(2) is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, this section does not apply to a security interest in that collateral created by that person.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Judgments and Causes of Actions.

Section 16-65-120 was not impliedly repealed by enactment of former § 4-9-102 and was the applicable local law; therefore, cause of action assigned to bank as collateral for loan prior to filing of federal tax liens by federal government against

assignor, and for which bank did not file a financing statement to perfect its interest under this section, took precedence over tax liens that arose out of unsecured obligation. *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464 (8th Cir. 1985) (decision under prior law).

4-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money — Perfection by permissive filing — Temporary perfection without filing or transfer of possession.

(a) A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) Except as otherwise provided in § 4-9-315(c) and (d) for proceeds:

(1) a security interest in a deposit account may be perfected only by control under § 4-9-314;

(2) and except as otherwise provided in § 4-9-308(d), a security interest in a letter-of-credit right may be perfected only by control under § 4-9-314; and

(3) a security interest in money may be perfected only by the secured party's taking possession under § 4-9-313.

(c) While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) a security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) a security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

- (1) issuance of a document in the name of the secured party;
 - (2) the bailee's receipt of notification of the secured party's interest;
- or

(3) filing as to the goods.

(e) A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession for a period of twenty (20) days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.

(f) A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for twenty (20) days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:

- (1) ultimate sale or exchange; or
- (2) loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) A perfected security interest in a certificated security or instrument remains perfected for twenty (20) days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

- (1) ultimate sale or exchange; or
- (2) presentation, collection, enforcement, renewal, or registration of transfer.

(h) After the twenty-day period specified in subsection (e), (f), or (g) expires, perfection depends upon compliance with this chapter.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Chattel mortgages.

Instruments.

Stock.

Surrender of possession.

Chattel Mortgages.

Sections 4-9-301 — 4-9-304 concern priorities of perfected and unperfected security interests as against third persons and are not applicable to a chattel mortgage as between the parties. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

Instruments.

Where a delivery debenture was a "security" and qualified as an "instrument" within the meaning of former § 4-9-

105(1)(i), when the secured party took possession of the delivery debenture, it perfected its security interest in the debenture. *Davidson v. Arkansas River Valley Grain Drying Coop.*, 692 F.2d 55 (8th Cir. 1982) (decision under prior law).

Where debtor assigned promissory note to his parents, but thereafter filed suit to collect the note, and transferred some of the proceeds to them, the parents did not "possess" the note while the debtor was enforcing it, and thus, under the pre-2001 version of this chapter, they did not have a perfected security interest in the note or its proceeds, and the trustee was entitled to avoid the preferential transfer of the proceeds. *Luker v. Reeves*, 65 F.3d 670 (8th Cir. 1995) (decision under prior law).

Stock.

No pre-2001 UCC provision prohibits

junior creditors from asserting a security interest in stock already pledged to a senior secured party. In *re Russell*, 101 Bankr. 62 (Bankr. W.D. Ark. 1989) (decision under prior law).

Surrender of Possession.

When bank surrendered possession of note which it held as security for a loan, it lost its security interest in the note. *McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972) (decision under prior law).

Where the senior secured party in possession of the collateral acknowledges and

accepts the instructions of the pledgor to deliver the collateral to the junior secured party after the debt to the senior secured party is satisfied under the pre-2001 version of this chapter, then the senior secured party is considered to possess the collateral as the agent or bailee of the junior secured party. In *re Russell*, 101 Bankr. 62 (Bankr. W.D. Ark. 1989) (decision under prior law).

Cited: *Affiliated Food Stores, Inc. v. F & M Bank*, 300 Ark. 450, 780 S.W.2d 20 (1989) (decisions under prior law).

4-9-313. When possession by or delivery to secured party perfects security interest without filing.

(a) Except as otherwise provided in subsection (b), a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under § 4-8-301.

(b) With respect to goods covered by a certificate of title issued by this state, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in § 4-9-316(d).

(c) With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) the person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) the person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under § 4-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) If a person acknowledges that it holds possession for the secured party's benefit:

(1) the acknowledgment is effective under subsection (c) or § 4-8-301(a), even if the acknowledgment violates the rights of a debtor; and

(2) unless the person otherwise agrees or law other than this chapter otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) to hold possession of the collateral for the secured party's benefit; or

(2) to redeliver the collateral to the secured party.

(i) A secured party does not relinquish possession, even if a delivery under subsection (h) violates the rights of a debtor. A person to which collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this chapter otherwise provides.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Certificates of deposit.

Possession.

Priority.

Stock.

Certificates of Deposit.

Certificates of deposit are "instruments" as defined in the pre-2001 version of the UCC and security interests in such instruments may be perfected through possession. *GE Co. v. M & C Mfg., Inc.*, 283 Ark. 110, 671 S.W.2d 189 (1984) (decision under prior law).

Possession.

Having failed to comply with § 27-14-801 et seq., a creditor was not a lien encumbrancer in so far as third parties were concerned under the motor vehicle registration requirements when another creditor took possession of the subject automobile. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

Bank which surrendered possession of note which it held as security for a loan lost its security interest in the note.

McIlroy Bank v. First Nat'l Bank, 252 Ark. 558, 480 S.W.2d 127 (1972) (decision under prior law).

Where the senior secured party in possession of the collateral acknowledges and accepts the instructions of the pledgor to deliver the collateral to the junior secured party after the debt to the senior secured party is satisfied, then the senior secured party is considered to possess the collateral as the agent or bailee of the junior secured party. *In re Russell*, 101 Bankr. 62 (Bankr. W.D. Ark. 1989) (decision under prior law).

Where debtor assigned promissory note to his parents, but thereafter filed suit to collect the note, and transferred some of the proceeds to them, the parents did not "possess" the note while the debtor was enforcing it, and thus they did not have a perfected security interest in the note or its proceeds, and the trustee was entitled to avoid the preferential transfer of the proceeds. *Luker v. Reeves*, 65 F.3d 670 (8th Cir. 1995) (decision under prior law).

Priority.

Where a creditor was neither a lien encumbrancer, in so far as third parties

are concerned under the Motor Vehicle Registration Act, nor the holder of a perfected security interest, a "lien creditor" or a buyer in the ordinary course of business under the Uniform Commercial Code, even though it held the title its security interest did not have priority over the security interest another creditor had perfected by possession. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

Stock.

No UCC provision prohibits junior creditors from asserting a security interest in stock already pledged to a senior secured party. *In re Russell*, 101 Bankr. 62 (Bankr. W.D. Ark. 1989) (decision under prior law).

Cited: *Henson v. Government Employees Fin. & Indus. Loan Corp.*, 257 Ark. 273, 516 S.W.2d 1 (1974); *Integon Indem. Corp. v. Bull*, 311 Ark. 61, 842 S.W.2d 1 (1992) (decisions under prior law).

4-9-314. Perfection by control.

(a) A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper may be perfected by control of the collateral under § 4-9-104, § 4-9-105, § 4-9-106, or § 4-9-107.

(b) A security interest in deposit accounts, electronic chattel paper, or letter-of-credit rights is perfected by control under § 4-9-104, § 4-9-105, or § 4-9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) A security interest in investment property is perfected by control under § 4-9-106 from the time the secured party obtains control and remains perfected by control until:

(1) the secured party does not have control; and

(2) one (1) of the following occurs:

(A) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

History. Acts 2001, No. 1439, § 1.

4-9-315. Secured party's rights on disposition of collateral and in proceeds.

(a) Except as otherwise provided in this chapter and in § 4-2-403(2):

(1) a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and

(2) a security interest attaches to any identifiable proceeds of collateral.

(b) Proceeds that are commingled with other property are identifiable proceeds:

(1) if the proceeds are goods, to the extent provided by § 4-9-336; and

(2) if the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of

equitable principles, that is permitted under law other than this chapter with respect to commingled property of the type involved.

(c) A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.

(d) A perfected security interest in proceeds becomes unperfected on the twenty-first day after the security interest attaches to the proceeds unless:

(1) the following conditions are satisfied:

(A) a filed financing statement covers the original collateral;

(B) the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and

(C) the proceeds are not acquired with cash proceeds;

(2) the proceeds are identifiable cash proceeds; or

(3) the security interest in the proceeds is perfected other than under subsection (c) when the security interest attaches to the proceeds or within twenty (20) days thereafter.

(e) If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under subdivision (d)(1) becomes unperfected at the later of:

(1) when the effectiveness of the filed financing statement lapses under § 4-9-515 or is terminated under § 4-9-513; or

(2) the twenty-first day after the security interest attaches to the proceeds.

History. Acts 2001, No. 1439, § 1.

RESEARCH REFERENCES

ALR. Government agricultural program payments as proceeds of agricultural products under former UCC § 9-306. 79 ALR 4th 903.

CASE NOTES

ANALYSIS

Assignment.
Continuing interest.
Conveyance in ordinary course of business.
Priority.
Proceeds.
Ratification of sale.
Repossession of collateral.
Setoff.
Unperfected interests.
Waiver of security interest.

Assignment.

Where debtor has notice of assignment, payment to an assignor, or discharge or release by him, is no defense to the claim of the assignee under the pre-2001 version

of this chapter. *Pulpwood Suppliers, Inc. v. First Nat'l Bank*, 21 Ark. App. 147, 729 S.W.2d 425 (1987) (decision under prior law).

Continuing Interest.

The plaintiff had security interest as a first preferred lien in mobile homes and could sell the mobile homes to satisfy the lien because the defendant buyer of these homes was not a buyer in "the ordinary course of business" and was not acting "in good faith and without knowledge" at the time of purchase of the mobile homes, where he was fully aware that the plaintiff had floorplanned and financed the homes and held a security in each of these mobile homes. *Rex Fin. Corp. v. Marshall*,

406 F. Supp. 567 (W.D. Ark. 1976) (decision under prior law).

Conveyance in Ordinary Course of Business.

When debtors conveyed their property to new corporation owned by debtors, bank's security interest in debtors' property or the proceeds from the sale of the property was not affected under the pre-2001 version of this chapter because the property was not conveyed to a buyer in the ordinary course of business. *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decision under prior law).

Priority.

The plain meaning and logical implications of sections such as former §§ 4-9-306 and 4-9-504 may be preempted by a pervasive spirit of priority that supports giving a senior secured party a claim to the proceeds of a junior creditor's sale of collateral. *Stotts v. Johnson*, 302 Ark. 439, 791 S.W.2d 351 (1990) (decision under prior law).

Proceeds.

Where a creditor financed an automobile for a dealer who sold the automobile and sold the financing agreement to another creditor, the original creditor's interest would attach only to the proceeds of the sale. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

The claim of first bank to a lien in the account balances of persons and corporation who had filed bankruptcy petition was rejected because it was junior to the claim of setoff of second bank by the express provisions of subdivision (4)(d) of this section since the evidence was undisputed that cash proceeds from sale of first bank's collateral was commingled with other funds in the account at the second bank. *Hoffman v. Portland Bank*, 51 Bankr. 42 (Bankr. W.D. Ark. 1985) (decision under prior law).

Payments to debtor under dairy termination program were not proceeds as defined in this section or as contemplated in note and security agreement. *Bank of N. Ark. v. Owens*, 76 Bankr. 672 (E.D. Ark. 1987), *aff'd*, 884 F.2d 330 (8th Cir. 1989) (decision under prior law).

Dairy termination payments are not

proceeds from the sale of dairy cattle. *Bank of N. Ark. v. Owens*, 884 F.2d 330 (8th Cir. 1989) (decision under prior law).

Ratification of Sale.

Delay in filing replevin suit until one and a half years after judicial sale alone did not amount to ratification of the sale. *Brown v. Arkoma Coal Corp.*, 276 Ark. 322, 634 S.W.2d 390 (1982) (decision under prior law).

Repossession of Collateral.

Where finance company entered into financial agreement with seller of mobile homes to extend credit for the purchase of inventory in exchange for an assignment by the seller of all chattel paper arising from the sale of the inventory, and where, after purchaser of a mobile home defaulted, the seller repossessed the collateral and, subsequent to filing bankruptcy petition, sold the mobile home, the finance company had a perfected security interest superior to the seller's trustee in bankruptcy and was entitled to the sale proceeds since the financing company's initial perfected security interest in the mobile home as collateral became both a perfected security interest in the proceeds of the sale against the seller under subsection (2) of this section and an after-sale security interest in the collateral against the purchaser, due to the assignment of the chattel paper with the lien noted on the certificate of title. Upon default by the purchaser, the financing company's prior perfected security interest in the collateral reattached under subsection (5)(a) of this section as if in effect continuously and, thus, the financing company's chattel paper security interest supplemented and did not supplant its inventory security interest and the company did not abdicate or subrogate its inventory security interest in the chattel paper security interest. *GECC v. McCoy*, 635 F.2d 726 (8th Cir. 1980) (decision under prior law).

Setoff.

The provisions of subdivision (4)(d) of this section are subject to the provisions of subdivision (4)(d)(i) of this section, which provides that the perfected security interest in proceeds is subject to any right of setoff. *Heckathorn Constr. Co. v. Bass Mechanical Contractors*, 84 Bankr. 1009 (Bankr. W.D. Ark. 1988) (decision under prior law).

Unperfected Interests.

Where one lender purchased the security instrument the buyer of an automobile gave to the automobile dealer and another lender held the title to the automobile as the result of a floor financing agreement with the dealer but neither lender had perfected its security interest, the lender who had purchased the buyer's contract was entitled to have the title registered to perfect its lien. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 541, 473 S.W.2d 876 (1971) (decision under prior law).

Waiver of Security Interest.

Credit association whose members were planter-borrowers could not follow proceeds of crops to third-party purchasers, since its common practice was to let its members dispose of their crops at will

and, thus, it had waived its security interest in the crops. *Planters' Prod. Credit Ass'n v. Bowles*, 256 Ark. 1063, 511 S.W.2d 645 (1974) (decision prior to 1975 amendment). (decision under prior law).

Filing of petition seeking to stay the distribution of the proceeds of a judicial sale on certain property in which petitioner claimed a security interest did not constitute a waiver of the security interest. *Brown v. Arkoma Coal Corp.*, 276 Ark. 322, 634 S.W.2d 390 (1982) (decision under prior law).

Cited: *Holmes v. Riceland Foods, Inc.*, 261 Ark. 27, 546 S.W.2d 414 (1977); *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981); *Honey v. United States*, 963 F.2d 1083 (8th Cir. 1992); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994) (decisions under prior law).

4-9-316. Continued perfection of security interest following change in governing law.

(a) A security interest perfected pursuant to the law of the jurisdiction designated in § 4-9-301(1) or § 4-9-305(c) remains perfected until the earliest of:

(1) the time perfection would have ceased under the law of that jurisdiction;

(2) the expiration of four (4) months after a change of the debtor's location to another jurisdiction; or

(3) the expiration of one (1) year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

(b) If a security interest described in subsection (a) becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(c) A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if:

(1) the collateral is located in one (1) jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(2) thereafter the collateral is brought into another jurisdiction; and

(3) upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

(d) Except as otherwise provided in subsection (e), a security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction when the goods become

covered by a certificate of title from this state remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered.

(e) A security interest described in subsection (d) becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under § 4-9-311(b) or § 4-9-313 are not satisfied before the earlier of:

(1) the time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from this state; or

(2) the expiration of four (4) months after the goods had become so covered.

(f) A security interest in deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:

(1) the time the security interest would have become unperfected under the law of that jurisdiction; or

(2) the expiration of four (4) months after a change of the applicable jurisdiction to another jurisdiction.

(g) If a security interest described in subsection (f) becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

History. Acts 2001, No. 1439, § 1.

SUBPART 3

PRIORITY

SECTION.

- 4-9-317. Interests that take priority over or take free of security interest or agricultural lien.
- 4-9-318. No interest retained in right to payment that is sold — Rights and title of seller of account or chattel paper with respect to creditors and purchasers.
- 4-9-319. Rights and title of consignee with respect to creditors and purchasers.
- 4-9-320. Buyer of goods.
- 4-9-321. Licensee of general intangible

SECTION.

- and lessee of goods in ordinary course of business.
- 4-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.
- 4-9-323. Future advances.
- 4-9-324. Priority of purchase-money security interests.
- 4-9-325. Priority of security interests in transferred collateral.
- 4-9-326. Priority of security interests created by new debtor.
- 4-9-327. Priority of security interests in deposit account.

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4-9-328. Priority of security interests in investment property.

4-9-329. Priority of security interests in letter-of-credit right.

4-9-330. Priority of purchaser of chattel paper or instrument.

4-9-331. Priority of rights of purchasers of instruments, documents, and securities under other chapters — Priority of interests in financial assets and security entitlements under chapter 8.

4-9-332. Transfer of money — Transfer of funds from deposit account.

SECTION.

4-9-333. Priority of certain liens arising by operation of law.

4-9-334. Priority of security interests in fixtures and crops.

4-9-335. Accessions.

4-9-336. Commingled goods.

4-9-337. Priority of security interests in goods covered by certificate of title.

4-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.

4-9-339. Priority subject to subordination.

4-9-317. Interests that take priority over or take free of security interest or agricultural lien.

(a) A security interest or agricultural lien is subordinate to the rights of:

(1) a person entitled to priority under § 4-9-322; and

(2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:

(A) the security interest or agricultural lien is perfected; or

(B) one (1) of the conditions specified in § 4-9-203(b)(3) is met and a financing statement covering the collateral is filed.

(b) Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) Except as otherwise provided in subsection (e), a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Except as otherwise provided in §§ 4-9-320 and 4-9-321, if a person files a financing statement with respect to a purchase-money security interest before or within twenty (20) days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

After-acquired property.
Buyers of farm products.
Chattel mortgages.
Federal tax liens.
Judgments and causes of action.
Unperfected security interests.

After-acquired Property.

Where person furnishing equipment to an institution had only an unperfected security interest in such equipment, it was subordinate under the pre-2001 version of this chapter to a properly filed deed of trust in the real property with an after acquired property clause. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964) (decision under prior law).

Buyers of Farm Products.

An auctioneer is merely a selling agent, not a "purchaser," under the pre-2001 version of this chapter and cannot claim the protection given to buyers of farm products in the ordinary course of business; accordingly, auctioneer who sold cattle in which bank had security interest was not a purchaser having priority over bank so as to avoid liability for conversion. *Commercial Bank v. Hales*, 281 Ark. 439, 665 S.W.2d 857 (1984) (decision under prior law).

Chattel Mortgages.

Former § § 4-9-301 — 4-9-304 concern priorities of perfected and unperfected security interests as against third persons and were not applicable to a chattel mortgage as between the parties. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

Federal Tax Liens.

Where bank failed to file its security interest, it held only an unperfected interest in contractor's accounts receivable and the contractor's assignment of such accounts receivable to the bank did not place the progress payments beyond the reach of the federal tax lien. *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972), cert. denied, 410 U.S. 909, 93 S. Ct. 963, 35 L.

Ed. 2d 270 (1973) (decision under prior law).

Where the guarantor of a bank loan failed to file his security interest in a chattel in accordance with § 4-9-401 before the agent service, without knowledge of the security interest, perfected the government's tax lien, the federal tax lien took priority over the unperfected guarantor's security interest. *Richardson v. United States*, 358 F. Supp. 994 (E.D. Ark. 1973) (decision under prior law).

Where the taxpayer assigned its right to be paid under a construction contract to the predecessor of a commercial bank and trust company as collateral for loans, and bank attempted to perfect its security interest but did not properly file its financing statement, the government had no notice or knowledge of the bank's interest as the bank did not perfect or "protect" its security interests and the government's tax lien had priority over the bank's imperfect security interest. *United States v. Ed Lusk Constr. Co.*, 504 F.2d 328 (10th Cir. 1974) (decision under prior law).

Judgments and Causes of Action.

Section 16-65-120, which relates specifically to the sale and assignment of judgments and causes of action, was not impliedly repealed by enactment of former § 4-9-102, and was the applicable local law; therefore, cause of action assigned to bank as collateral for loan prior to filing of federal tax liens by federal government against assignor took precedence over tax liens that arose out of unsecured obligation. *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464 (8th Cir. 1985) (decision under prior law).

Unperfected Security Interests.

Where the funds in a dealer reserve account were proceeds from the sale of inventory to which the Small Business Administration's (SBA's) security interest in accounts receivable attached, the SBA's perfected security interest took priority over a subsequent lien creditor; even assuming that the SBA's security interest did not attach until all the installment sales contracts had been paid out, a cred-

itor's lien would, at best, attach the same time and would still be subject to the SBA's prior security interest. *Sperry Corp. v. Farm Implement, Inc.*, 760 F.2d 196 (8th Cir. 1985) (decision under prior law).

Cited: *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968); *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971); *National Bedding & Furn.*

Indus., Inc. v. Clark, 252 Ark. 780, 481 S.W.2d 690 (1972); *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972); *Hill v. Bank of N.E. Ark.*, 264 Ark. 412, 572 S.W.2d 150 (1978); *Doyle v. Phillips Petro. Co.*, 527 F. Supp. 153 (E.D. Ark. 1981); *Stotts v. Johnson*, 302 Ark. 439, 791 S.W.2d 351 (1990); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994) (decisions under prior law).

4-9-318. No interest retained in right to payment that is sold — Rights and title of seller of account or chattel paper with respect to creditors and purchasers.

(a) A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

(b) For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold.

History. Acts 2001, No. 1439, § 1.

4-9-319. Rights and title of consignee with respect to creditors and purchasers.

(a) Except as otherwise provided in subsection (b), for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

(b) For purposes of determining the rights of a creditor of a consignee, law other than this chapter determines the rights and title of a consignee while goods are in the consignee's possession if, under this part, a perfected security interest held by the consignor would have priority over the rights of the creditor.

History. Acts 2001, No. 1439, § 1.

4-9-320. Buyer of goods.

(a) Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

(b) Except as otherwise provided in subsection (e), a buyer of goods from a person who used or bought the goods for use primarily for

personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

- (1) without knowledge of the security interest;
- (2) for value;
- (3) primarily for the buyer's personal, family, or household purposes; and
- (4) before the filing of a financing statement covering the goods.

(c) To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b), the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by § 4-9-316(a) and (b).

(d) A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) Subsections (a) and (b) do not affect a security interest in goods in the possession of the secured party under § 4-9-313.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Buyer in ordinary course of business.
Purchase of security instrument.

Buyer in Ordinary Course of Business.

The plaintiff had security interest as a first preferred lien in mobile homes and could sell the mobile homes to satisfy the lien because the defendant buyer of these homes was not a buyer in "the ordinary course of business" and was not acting "in good faith and without knowledge" at the time of purchase of the mobile homes, where he was fully aware that the plaintiff had floorplanned and financed the homes and held a security in each of these mobile homes. *Rex Fin. Corp. v. Marshall*, 406 F. Supp. 567 (W.D. Ark. 1976) (decision under prior law).

Buyer was not buyer in ordinary course of business under the pre-2001 version of this chapter. *Merchants & Planters Bank & Trust Co. v. Phoenix Hous. Sys.*, 21 Ark. App. 153, 729 S.W.2d 433 (1987) (decision under prior law).

When debtors conveyed their property to new corporation owned by debtors, bank's security interest in debtors' property or the proceeds from the sale of the

property was not affected under pre-2001 version of this chapter because the property was not conveyed to a buyer in the ordinary course of business. *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decision under prior law).

Purchase of Security Instrument.

Where one lender purchased the security instrument the buyer of an automobile gave to the automobile dealer and another lender held the title to the automobile as the result of a floor financing agreement with the dealer but neither lender had perfected its security interest, the lender who had purchased the buyer's contract was entitled to have the title registered to perfect its lien. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 541, 473 S.W.2d 876 (1971) (decision under prior law).

Cited: *Commercial Credit Corp. v. Associates Dist. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969); *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981); *Wawak v. Affiliated Food Stores, Inc.*, 306 Ark. 186, 812 S.W.2d 679 (1991); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994) (decisions under prior law).

4-9-321. Licensee of general intangible and lessee of goods in ordinary course of business.

(a) In this section, “licensee in ordinary course of business” means a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor’s own usual or customary practices.

(b) A licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence.

(c) A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence.

History. Acts 2001, No. 1439, § 1.

4-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.

(a) Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) For the purposes of subsection (a)(1):

(1) the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) the time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under § 4-9-327, § 4-9-328, § 4-9-329, § 4-9-330, or § 4-9-331 also has priority over a conflicting security interest in:

(1) any supporting obligation for the collateral; and

(2) proceeds of the collateral if:

(A) the security interest in proceeds is perfected;

(B) the proceeds are cash proceeds or of the same type as the collateral; and

(C) in the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) Subject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) Subsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) Subsections (a)-(e) are subject to:

(1) subsection (g) and the other provisions of this part;

(2) § 4-4-210 with respect to a security interest of a collecting bank;

(3) § 4-5-118 with respect to a security interest of an issuer or nominated person; and

(4) § 4-9-110 with respect to a security interest arising under chapter 2 or chapter 2A.

(g) A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Attachment of interest.

Continuation statements.

Good faith.

Growing crops.

Time of filing.

Attachment of Interest.

Where the funds in a dealer reserve account were proceeds from the sale of inventory to which the Small Business Administration's (SBA's) security interest in accounts receivable attached, the SBA's perfected security interest took priority over a subsequent lien creditor; even assuming that the SBA's security interest did not attach until all the installment sales contracts had been paid out, a creditor's lien would, at best, attach under the pre-2001 version of this chapter at the same time and would still be subject to the

SBA's prior security interest. *Sperry Corp. v. Farm Implement, Inc.*, 760 F.2d 196 (8th Cir. 1985) (decision under prior law).

Continuation Statements.

Where the second financing statement, filed just before the first financing statement expired, contained the signature of the secured party, but did not contain any of the other elements necessary for filing a continuation statement under the pre-2001 version of this chapter, it was not a continuation statement, and the second creditor who had filed a financing statement in the interim was entitled to priority. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 60 Bankr. 500 (Bankr. W.D. Ark. 1986), *aff'd*, 74 Bankr. 125 (W.D. Ark. 1986) (decision under prior law).

Security interest had first priority pursuant to former § 4-9-312(5) where financing statement lapsed due to failure to

file a continuation statement, leaving the underlying security interest unperfected. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

Good Faith.

Where a partnership, which had executed a trust deed covering after-acquired property, executed a security agreement on after-acquired property, in violation of an agreement in connection with the trust deed, to a corporation controlled by the same persons, the corporation was lacking in good faith and was a participant in the breach so as to bar its enforcement of the security agreement in preference to the trust deed. *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969) (decision under prior law).

Growing Crops.

Where debtor's obligation to repay the Farmer's Home Administration (FmHA) was not more than six months overdue when debtor's 1981 rice crop became a growing crop, subsequent creditor's security interest was not entitled to priority under former § 4-9-312(2), and the FmHA's security interest, being the first to have been perfected, was entitled to priority under subsection (5) of this section. *Dennis v. Connor*, 733 F.2d 523 (8th Cir. 1984) (decision under prior law).

Former § 4-9-312(2) is an accommodation to the special needs of the farming community, giving priority to the so-called "seed money lender" who lends money to a farmer to enable him to plant his crop. *Niedermeier v. Central Prod. Credit Ass'n*, 300 Ark. 116, 777 S.W.2d 210 (1989) (decision under prior law).

Under former § 4-9-312(2) new value arises where a secured party (1) makes an advance, (2) incurs an obligation, or (3) releases a perfected security interest. *Niedermeier v. Central Prod. Credit Ass'n*, 300 Ark. 116, 777 S.W.2d 210 (1989) (decision under prior law).

Time of Filing.

The seller of equipment to an institution, having a security interest on such equipment, would have had priority over the holder of a deed of trust to the real estate of such institution if he had per-

fecting it by filing it within the statutory period after delivery of the equipment. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964) (decision under prior law).

An FHA lien under a deed of trust covering an apartment house and its furniture given by a partnership has priority over the purchase money lien of the corporation which sold the furniture to the partnership where the corporation failed to file its financing statement contemporaneously with the delivery of the furniture or within the statutory period thereafter. *United States v. Thompson*, 272 F. Supp. 774 (E.D. Ark. 1967), *aff'd*, 408 F.2d 1075 (8th Cir. 1969) (decision under prior law).

Although bank filed first, it was not the first to file correctly, which was required under the pre-2001 version of this chapter in order for it to have priority. *Affiliated Food Stores, Inc. v. F & M Bank*, 300 Ark. 450, 780 S.W.2d 20 (1989) (decision under prior law).

Where one creditor bank filed its documents with the Circuit Clerk of Pulaski County and with the Secretary of State, and a second creditor bank later filed its documents with the Circuit Clerk of Saline County and with the Secretary of State, since the debtor had a place of business in more than one county, the security interest was perfected when the financing statement was filed with the Secretary of State's office; thus, the first bank's security interest had priority over the claim of the second bank in the proceeds from the sale of property determined to be property of the estate. *Rice v. Fas Fax Corp. (In re Hot Shots Burgers & Fries, Inc.)*, 169 Bankr. 920 (Bankr. E.D. Ark. 1994) (decision under prior law).

Cited: *Worthen Bank & Trust Co. v. National Bank of Commerce (In re Hilyard Drilling Co.)*, 74 Bankr. 125 (W.D. Ark. 1986); *First Nat'l Bank v. Massachusetts Gen. Life Ins. Co.*, 296 Ark. 28, 752 S.W.2d 1 (1988); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990); *Stotts v. Johnson*, 302 Ark. 439, 791 S.W.2d 351 (1990) (decisions under prior law).

4-9-323. Future advances.

(a) Except as otherwise provided in subsection (c), for purposes of determining the priority of a perfected security interest under § 4-9-322(a) (1), perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that:

(1) is made while the security interest is perfected only:

(A) under § 4-9-309 when it attaches; or

(B) temporarily under § 4-9-312(e), (f), or (g); and

(2) is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under § 4-9-309 or § 4-9-312(e), (f), or (g).

(b) Except as otherwise provided in subsection (c), a security interest is subordinate to the rights of a person that becomes a lien creditor to the extent that the security interest secures an advance made more than forty-five (45) days after the person becomes a lien creditor unless the advance is made:

(1) without knowledge of the lien; or

(2) pursuant to a commitment entered into without knowledge of the lien.

(c) Subsections (a) and (b) do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor.

(d) Except as otherwise provided in subsection (e), a buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the earlier of:

(1) the time the secured party acquires knowledge of the buyer's purchase; or

(2) forty-five (45) days after the purchase.

(e) Subsection (d) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the forty-five-day period.

(f) Except as otherwise provided in subsection (g), a lessee of goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a security interest to the extent that it secures advances made after the earlier of:

(1) the time the secured party acquires knowledge of the lease; or

(2) forty-five (45) days after the lease contract becomes enforceable.

(g) Subsection (f) does not apply if the advance is made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the forty-five-day period.

History. Acts 2001, No. 1439, § 1.

4-9-324. Priority of purchase-money security interests.

(a) Except as otherwise provided in subsection (g), a perfected purchase-money security interest in goods other than inventory or

livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in § 4-9-327, a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within twenty (20) days thereafter.

(b) Subject to subsection (c) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in § 4-9-330, and, except as otherwise provided in § 4-9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

(1) the purchase-money security interest is perfected when the debtor receives possession of the inventory;

(2) the purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) the holder of the conflicting security interest receives the notification within five (5) years before the debtor receives possession of the inventory; and

(4) the notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(c) Subdivisions (b)(2)-(4) apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

(1) if the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) if the purchase-money security interest is temporarily perfected without filing or possession under § 4-9-312(f), before the beginning of the 20-day period thereunder.

(d) Subject to subsection (e) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and, except as otherwise provided in § 4-9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

(1) the purchase-money security interest is perfected when the debtor receives possession of the livestock;

(2) the purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) the holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock; and

(4) the notification states that the person sending the notification has or expects to acquire a purchase-money security interest in livestock of the debtor and describes the livestock.

(e) Subdivisions (d)(2)-(4) apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:

(1) if the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) if the purchase-money security interest is temporarily perfected without filing or possession under § 4-9-312(f), before the beginning of the twenty-day period thereunder.

(f) Except as otherwise provided in subsection (g), a perfected purchase-money security interest in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in § 4-9-327, a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase-money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under this section.

(g) If more than one security interest qualifies for priority in the same collateral under subsection (a), (b), (d), or (f):

(1) a security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in or the use of collateral; and

(2) in all other cases, § 4-9-322(a) applies to the qualifying security interests.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Landlord's lien.

Purchase money lien.

Landlord's Lien.

When the legislature adopted the landlord's lien in 1987 (§ 18-16-108), it was mindful of this state's longstanding aversion to a landlord's lien and of the strict construction that would be applied to such legislation, and was also aware of the law and policies embodied in this subtitle; the legislature never intended a landlord's lien which arose simultaneously with a purchase money security interest (former § 4-9-107 and former § 4-9-312(4)) to have priority. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993) (decision under prior law).

While a landlord's lien under § 18-16-108 is not a security interest under this subtitle, and therefore not a "conflicting security interest" under this section, the landlord's lien operates, in effect, as a

floating lien on after-acquired property (former § 4-9-204); it was exactly this kind of lien for which former § 4-9-312 was structured, in order to protect the purchase money lien creditor. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993) (decision under prior law).

Purchase Money Lien.

The purchase money lien of a vendor in an air conditioning unit, a cooling tower, a kitchen range and oven, and duct work supplied by such vendor, to have priority over conflicting liens had to be perfected within statutory period after delivery to the debtor under the pre-2001 version of this chapter. *House v. Long*, 244 Ark. 718, 426 S.W.2d 814 (1968) (decision under prior law).

Under the pre-2001 version of this chapter, the purchase money party must be one who gives value by making advances or incurring an obligation, excluding from

the purchase money category any security interest taken as security or satisfaction for a preexisting claim or antecedent debt. *Niedermeier v. Central Prod. Credit Ass'n*, 300 Ark. 116, 777 S.W.2d 210 (1989) (decision under prior law).

4-9-325. Priority of security interests in transferred collateral.

(a) Except as otherwise provided in subsection (b), a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if:

(1) the debtor acquired the collateral subject to the security interest created by the other person;

(2) the security interest created by the other person was perfected when the debtor acquired the collateral; and

(3) there is no period thereafter when the security interest is unperfected.

(b) Subsection (a) subordinates a security interest only if the security interest:

(1) otherwise would have priority solely under § 4-9-322(a) or § 4-9-324; or

(2) arose solely under § 4-2-711(3) or § 4-2A-508(5).

History. Acts 2001, No. 1439, § 1.

4-9-326. Priority of security interests created by new debtor.

(a) Subject to subsection (b), a security interest created by a new debtor which is perfected by a filed financing statement that is effective solely under § 4-9-508 in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under § 4-9-508.

(b) The other provisions of this part determine the priority among conflicting security interests in the same collateral perfected by filed financing statements that are effective solely under § 4-9-508. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound.

History. Acts 2001, No. 1439, § 1.

4-9-327. Priority of security interests in deposit account.

The following rules govern priority among conflicting security interests in the same deposit account:

(1) A security interest held by a secured party having control of the deposit account under § 4-9-104 has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in paragraphs (3) and (4), security interests perfected by control under § 4-9-314 rank according to priority in time of obtaining control.

(3) Except as otherwise provided in paragraph (4), a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under § 4-9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.

History. Acts 2001, No. 1439, § 1.

4-9-328. Priority of security interests in investment property.

The following rules govern priority among conflicting security interests in the same investment property:

(1) A security interest held by a secured party having control of investment property under § 4-9-106 has priority over a security interest held by a secured party that does not have control of the investment property.

(2) Except as otherwise provided in paragraphs (3) and (4), conflicting security interests held by secured parties each of which has control under § 4-9-106 rank according to priority in time of:

(A) if the collateral is a security, obtaining control;

(B) if the collateral is a security entitlement carried in a securities account and:

(i) if the secured party obtained control under § 4-8-106(d)(1), the secured party's becoming the person for which the securities account is maintained;

(ii) if the secured party obtained control under § 4-8-106(d)(2), the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried or to be carried in the securities account; or

(iii) if the secured party obtained control through another person under § 4-8-106(d)(3), the time on which priority would be based under this paragraph if the other person were the secured party; or

(C) if the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in § 4-9-106(b)(2) with respect to commodity contracts carried or to be carried with the commodity intermediary.

(3) A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(4) A security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest in a certificated security in registered form which is perfected by taking delivery under § 4-9-313(a) and not by control under § 4-9-314 has priority over a conflicting security interest perfected by a method other than control.

(6) Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under § 4-9-106 rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by §§ 4-9-322 and 4-9-323.

History. Acts 2001, No. 1439, § 1.

4-9-329. Priority of security interests in letter-of-credit right.

The following rules govern priority among conflicting security interests in the same letter-of-credit right:

(1) A security interest held by a secured party having control of the letter-of-credit right under § 4-9-107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control.

(2) Security interests perfected by control under § 4-9-314 rank according to priority in time of obtaining control.

History. Acts 2001, No. 1439, § 1.

4-9-330. Priority of purchaser of chattel paper or instrument.

(a) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under § 4-9-105; and

(2) the chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser.

(b) A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under § 4-9-105 in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party.

(c) Except as otherwise provided in § 4-9-327, a purchaser having priority in chattel paper under subsection (a) or (b) also has priority in proceeds of the chattel paper to the extent that:

(1) § 4-9-322 provides for priority in the proceeds; or

(2) the proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected.

(d) Except as otherwise provided in § 4-9-331(a), a purchaser of an instrument has priority over a security interest in the instrument

perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party.

(e) For purposes of subsections (a) and (b), the holder of a purchase-money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory.

(f) For purposes of subsections (b) and (d), if chattel paper or an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the purchase violates the rights of the secured party.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Proceeds.

Purchase of security instrument.

Proceeds.

Where a creditor financed an automobile for a dealer who sold the automobile and sold the financing agreement to another creditor, the original creditor's interest would attach only to the proceeds of the sale. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

Purchase of Security Instrument.

Where one lender purchased the security instrument the buyer of an automobile gave to the automobile dealer and another lender held the title to the automobile as the result of a floor financing agreement with the dealer but neither lender had perfected its security interest, the lender who had purchased the buyer's contract was entitled to have the title registered to perfect its lien. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 541, 473 S.W.2d 876 (1971) (decision under prior law).

4-9-331. Priority of rights of purchasers of instruments, documents, and securities under other chapters — Priority of interests in financial assets and security entitlements under chapter 8.

(a) This chapter does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in chapter 3, chapter 7, and chapter 8.

(b) This chapter does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under chapter 8.

(c) Filing under this chapter does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b).

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Failure to Create Security Interest.

Under the U.C.C., an agent may not create a valid security interest by wrongfully converting the principal's property,

even if the agent's creditors acted in good faith. *Pachter, Gold & Schaffer v. Yantis*, 742 F. Supp. 544 (W.D. Ark. 1990) (decision under prior law).

4-9-332. Transfer of money — Transfer of funds from deposit account.

(a) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

History. Acts 2001, No. 1439, § 1.

4-9-333. Priority of certain liens arising by operation of law.

(a) In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:

(1) which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;

(2) which is created by statute or rule of law in favor of the person; and

(3) whose effectiveness depends on the person's possession of the goods.

(b) A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Attorney's liens.

Mechanic's liens.

Attorney's Liens.

An attorney did not have a lien on the cash proceeds of a settlement agreement since such proceeds did not constitute "goods" within the meaning of this section. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 971 S.W.2d 788 (1998) (decision under prior law).

Mechanic's Liens.

The lien of a mechanic repairing an automobile is a statutory lien within the meaning of this section and, therefore, does not have priority over the lien of the vendor of an automobile retaining title therein for the balance of purchase money owing thereon. *Bond v. Dudley*, 244 Ark. 568, 426 S.W.2d 780 (1968) (decision under prior law).

Cited: *In re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965); *Bokker v. Hill*, 327 Ark. 742, 940 S.W.2d 852 (1997) (decisions under prior law).

4-9-334. Priority of security interests in fixtures and crops.

(a) A security interest under this chapter may be created in goods that are fixtures or may continue in goods that become fixtures. A security interest does not exist under this chapter in ordinary building materials incorporated into an improvement on land.

(b) This chapter does not prevent creation of an encumbrance upon fixtures under real property law.

(c) In cases not governed by subsections (d)-(h), a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor.

(d) Except as otherwise provided in subsection (h), a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:

(1) the security interest is a purchase-money security interest;

(2) the interest of the encumbrancer or owner arises before the goods become fixtures; and

(3) the security interest is perfected by a fixture filing before the goods become fixtures or within twenty (20) days thereafter.

(e) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) the debtor has an interest of record in the real property or is in possession of the real property and the security interest:

(A) is perfected by a fixture filing before the interest of the encumbrancer or owner is of record; and

(B) has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner;

(2) before the goods become fixtures, the security interest is perfected by any method permitted by this chapter and the fixtures are readily removable:

(A) factory or office machines;

(B) equipment that is not primarily used or leased for use in the operation of the real property; or

(C) replacements of domestic appliances that are consumer goods;

(3) the conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this chapter; or

(4) the security interest is:

(A) created in a manufactured home in a manufactured-home transaction; and

(B) perfected pursuant to a statute described in § 4-9-311(a)(2).

(f) A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real property if:

(1) the encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures; or

(2) the debtor has a right to remove the goods as against the encumbrancer or owner.

(g) The priority of the security interest under paragraph (f)(2) continues for a reasonable time if the debtor's right to remove the goods as against the encumbrancer or owner terminates.

(h) A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if a recorded record of the mortgage so indicates. Except as otherwise provided in subsections (e) and (f), a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.

(i) A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Encumbrances.
Filing.
Fixtures.
Preexisting interests.
Priority.

Encumbrances.

An encumbrancer is one who holds a burden, charge, or lien on property or an estate to the diminution of the value of the fee, but which does not prevent the passing of the fee by conveyance. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

Where the person making the annexation was the owner of the realty; the realty was being used as a grain storage facility and the chattels in question were grain storage bins; the bins were assembled and erected on the realty and this installation involved the pouring of a concrete slab with bolts imbedded in it, the facility had become a fixture. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

Filing.

A purchase money security interest in

equipment which became fixtures must meet the filing requirements of § 4-9-401(1)(b) to have priority over prior encumbrances of the real estate. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964) (decision under prior law).

Fixtures.

Unless the facts are undisputed and reasonable minds could only reach one conclusion, the question whether particular property constitutes a fixture is sometimes one of fact only, but usually is a mixed question of law and fact. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

The basic rules under the pre-2001 version of this chapter for determining whether an article remains a chattel or becomes a fixture are: (1) real or constructive annexation to the realty in question; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; and (3) the intention of the party making the annexation to make a permanent accession to the realty, this intention being inferred from the nature of the chattel, the relation and situ-

ation of the party making the annexation, the structure and mode of annexation, and the purpose for which the annexation has been made. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979); *In re Hot Shots Burgers & Fries, Inc.*, 147 Bankr. 484 (Bankr. E.D. Ark. 1992) (decision under prior law).

The inference is strong, where the party attaching the "fixture" is the owner of the soil, that it was intended to become a part of the soil and not a removable fixture, and to overturn it, there must be strong evidence of a contrary intention manifested by some act or circumstance. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

A building constructed on the land of another with the owner's consent, may remain the property of the person annexing the building if there is an understanding, either expressed or implied, that the building under the pre-2001 version of this chapter shall remain personalty, or there is an express reservation of a right to remove the building. *In re Hot Shots Burgers & Fries, Inc.*, 147 Bankr. 484 (Bankr. E.D. Ark. 1992) (decision under prior law).

When no understanding exists as to the right of removal of the building, a determination must be made as to whether the building has become a "fixture"; a fixture is defined under the pre-2001 version of this chapter as property annexed to the freehold for use in connection therewith and so arranged that it cannot be removed without injury to the freehold. *In re Hot Shots Burgers & Fries, Inc.*, 147 Bankr. 484 (Bankr. E.D. Ark. 1992) (decision under prior law).

Where a debtor annexed a building on the real property for the sole purpose of operating his business, and the building was not annexed with the intention of making the building a permanent addition to the realty, under the pre-2001 version of this chapter the building also constituted a trade fixture and remained

personal property. *In re Hot Shots Burgers & Fries, Inc.*, 147 Bankr. 484 (Bankr. E.D. Ark. 1992) (decision under prior law).

Arkansas courts have adopted a three-part test to determine whether an item is a fixture under the pre-2001 version of this chapter: (1) whether the item is annexed to the realty; (2) whether the item is appropriate and adapted to the use or purpose of that part of the realty to which the item is connected; and (3) whether the party making annexation intended to make it permanent. *Rice v. Fas Fax Corp.* (*In re Hot Shots Burgers & Fries, Inc.*), 169 Bankr. 920 (Bankr. E.D. Ark. 1994) (decision under prior law).

Modular building held not to be a permanent fixture under the pre-2001 version of this chapter. *Rice v. Fas Fax Corp.* (*In re Hot Shots Burgers & Fries, Inc.*), 169 Bankr. 920 (Bankr. E.D. Ark. 1994) (decision under prior law).

Preexisting Interests.

Although this section makes marked changes in the law of fixtures, where deed of trust was entered into and recorded prior to the effective date of this subtitle, its priority under former law was saved by § 4-10-102(4). *Wilson v. Prudential Ins. Co. of Am.*, 239 Ark. 1071, 396 S.W.2d 300 (1965) (decision under prior law).

Priority.

The lien of the supplier of an air conditioning unit, cooling tower, kitchen range and oven, and duct work attaching before such goods became fixtures took priority over the lien of prior mortgages to the extent of funds advanced under such mortgage liens as to funds advanced afterward. *House v. Long*, 244 Ark. 718, 426 S.W.2d 814 (1968) (decision under prior law).

Cited: *In re Factory Homes Corp.*, 333 F. Supp. 126 (W.D. Ark. 1971); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990) (decisions under prior law).

4-9-335. Accessions.

(a) A security interest may be created in an accession and continues in collateral that becomes an accession.

(b) If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral.

(c) Except as otherwise provided in subsection (d), the other provisions of this subchapter determine the priority of a security interest in an accession.

(d) A security interest in an accession is subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate-of-title statute under § 4-9-311(b).

(e) After default, subject to § 4-9-601 et seq., a secured party may remove an accession from other goods if the security interest in the accession has priority over the claims of every person having an interest in the whole.

(f) A secured party that removes an accession from other goods under subsection (e) shall promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

History. Acts 2001, No. 1439, § 1.

4-9-336. Commingled goods.

(a) In this section, “commingled goods” means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.

(b) A security interest does not exist in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) is perfected.

(e) Except as otherwise provided in subsection (f), the other provisions of this part determine the priority of a security interest that attaches to the product or mass under subsection (c).

(f) If more than one (1) security interest attaches to the product or mass under subsection (c), the following rules determine priority:

(1) A security interest that is perfected under subsection (d) has priority over a security interest that is unperfected at the time the collateral becomes commingled goods.

(2) If more than one (1) security interest is perfected under subsection (d), the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods.

History. Acts 2001, No. 1439, § 1.

4-9-337. Priority of security interests in goods covered by certificate of title.

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, this state issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate:

(1) a buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) the security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under § 4-9-311(b), after issuance of the certificate and without the conflicting secured party's knowledge of the security interest.

History. Acts 2001, No. 1439, § 1.

4-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in § 4-9-516(b)(5) which is incorrect at the time the financing statement is filed:

(1) the security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) a purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper, documents, goods, instruments, or a security certificate, receives delivery of the collateral.

History. Acts 2001, No. 1439, § 1.

4-9-339. Priority subject to subordination.

This chapter does not preclude subordination by agreement by a person entitled to priority.

History. Acts 2001, No. 1439, § 1.

CASE NOTES**ANALYSIS**

No agreement.
Priority interest.

No Agreement.

Finding that letter did not constitute a subordination agreement held not erroneous under former § 4-9-316. Worthen

Bank & Trust Co. v. Hilyard Drilling Co., 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

1986), aff'd, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

Priority Interest.

Under former § 4-9-316, the party being subordinated must hold a priority interest. Worthen Bank & Trust Co. v. National Bank of Commerce (In re Hilyard Drilling Co.), 74 Bankr. 125 (W.D. Ark.

Cited: Planters' Prod. Credit Ass'n v. Bowles, 256 Ark. 1063, 511 S.W.2d 645 (1974); Worthen Bank & Trust Co. v. Hilyard Drilling Co., 60 Bankr. 500 (Bankr. W.D. Ark. 1986) (decisions under prior Law).

SUBPART 4

RIGHTS OF BANK

SECTION.

4-9-340. Effectiveness of right of recoupment or set-off against deposit account.

4-9-341. Bank's rights and duties with respect to deposit account.

SECTION.

4-9-342. Bank's right to refuse to enter into or disclose existence of control agreement.

4-9-340. Effectiveness of right of recoupment or set-off against deposit account.

(a) Except as otherwise provided in subsection (c), a bank with which a deposit account is maintained may exercise any right of recoupment or set-off against a secured party that holds a security interest in the deposit account.

(b) Except as otherwise provided in subsection (c), the application of this chapter to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.

(c) The exercise by a bank of a set-off against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which is perfected by control under § 4-9-104(a)(3), if the set-off is based on a claim against the debtor.

History. Acts 2001, No. 1439, § 1.

4-9-341. Bank's rights and duties with respect to deposit account.

Except as otherwise provided in § 4-9-340(c), and unless the bank otherwise agrees in an authenticated record, a bank's rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by:

(1) the creation, attachment, or perfection of a security interest in the deposit account;

(2) the bank's knowledge of the security interest; or

(3) the bank's receipt of instructions from the secured party.

History. Acts 2001, No. 1439, § 1.

4-9-342. Bank's right to refuse to enter into or disclose existence of control agreement.

This chapter does not require a bank to enter into an agreement of the kind described in § 4-9-104(a)(2), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer.

History. Acts 2001, No. 1439, § 1.

PART 4 — RIGHTS OF THIRD PARTIES

SECTION.

- 4-9-401. Alienability of debtor's rights.
- 4-9-402. Secured party not obligated on contract of debtor or in tort.
- 4-9-403. Agreement not to assert defenses against assignee.
- 4-9-404. Rights acquired by assignee — Claims and defenses against assignee.
- 4-9-405. Modification of assigned contract.
- 4-9-406. Discharge of account debtor — Notification of assignment — Identification and proof of assignment — Restrictions on assignment of accounts, chattel paper, pay-

SECTION.

- ment intangibles, and promissory notes ineffective.
- 4-9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.
- 4-9-408. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.
- 4-9-409. Restrictions on assignment of letter-of-credit rights ineffective.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

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CASE NOTES

Assignment.

"Assignment" language held to provide means of perfecting security interest in accounts receivable. *Northwest Nat'l Bank v. Merrill Lynch, Pierce, Fenner &*

Smith, Inc., 25 Ark. App. 279, 757 S.W.2d 182 (1988) (decision under prior law).

One cannot obtain a superior property right than its assignor. *First Nat'l Bank v. Massachusetts Gen. Life Ins. Co.*, 296 Ark.

28, 752 S.W.2d 1 (1988) (decision under prior law).

4-9-401. Alienability of debtor's rights.

(a) Except as otherwise provided in subsection (b) and §§ 4-9-406 — 4-9-409, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this chapter.

(b) An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Attachment.

Bank's action in merely causing encumbered tractor to be sold under attachment was not in itself wrongful and tractor seller, who perfected lien for the unpaid purchase price by taking a security agreement and filing financing statement, was not entitled to recover from bank on the-

ory of "conversion." *Citizens Bank v. Perrin & Sons*, 253 Ark. 639, 488 S.W.2d 14 (1972) (decision under prior law).

Cited: *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 541, 473 S.W.2d 876 (1971) (decisions under prior law).

4-9-402. Secured party not obligated on contract of debtor or in tort.

The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions.

History. Acts 2001, No. 1439, § 1.

4-9-403. Agreement not to assert defenses against assignee.

(a) In this section, "value" has the meaning provided in § 4-3-303(a).

(b) Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

- (1) for value;
- (2) in good faith;
- (3) without notice of a claim of a property or possessory right to the property assigned; and
- (4) without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under § 4-3-305(a).

(c) Subsection (b) does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under § 4-3-305(b).

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this chapter requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement:

(1) the record has the same effect as if the record included such a statement; and

(2) the account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

(e) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(f) Except as otherwise provided in subsection (d), this section does not displace law other than this chapter which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Chattel mortgages.
Summary judgment.

Chattel Mortgages.

As between the parties, §§ 4-9-204 — 4-9-206 control the validity and enforcement of a chattel mortgage. *Anderson v. First Jacksonville Bank*, 243 Ark. 977, 423 S.W.2d 273 (1968) (decision under prior law).

Summary Judgment.

Where defendant signed a waiver

clause that he would not use any claim against the seller as a defense, set-off, or counterclaim against a holder in due course of a note for the sale of consumer goods, under this section the case was a proper one for summary judgment. *Beam v. John Deere Co.*, 240 Ark. 107, 398 S.W.2d 218 (1966) (decision under prior law).

Cited: *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970) (decisions under prior law).

4-9-404. Rights acquired by assignee — Claims and defenses against assignee.

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b)-(e), the rights of an assignee are subject to:

(1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) Subject to subsection (c) and except as otherwise provided in subsection (d), the claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes.

(c) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) In a consumer transaction, if a record evidences the account debtor's obligation, law other than this chapter requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement.

(e) This section does not apply to an assignment of a health-care-insurance receivable.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Assignment.

Knowledge of secured party.

Setoff.

Superiority of rights.

Assignment.

"Assignment" language held to provide means of perfecting security interest in accounts receivable. *Northwest Nat'l Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 25 Ark. App. 279, 757 S.W.2d 182 (1988) (decision under prior law).

Knowledge of Secured Party.

Where bank-assignee was aware of subcontractor-assignor's financial difficulties, and financial loss resulted from failure to pay materialmen who had assisted in construction of apartment complex, owners-general contractors who had made progress payments jointly to subcontractor-assignor and bank-assignee which had loaned money to subcontractor, without making an effort to verify that all previous bills for labor and materials had been

paid, were entitled to recover amount of loss from the bank. *Benton State Bank v. Warren*, 263 Ark. 1, 562 S.W.2d 74 (1978) (decision under prior law).

Setoff.

A bank did not assume responsibility for the performance of a construction contract between a contractor and a carpet manufacturing plant by setting off a deposit by the contractor against the contractor's mortgage indebtedness, for the setoff by the bank was not under its security interest but was an exercise of its common law right which was supplemented by an agreement set out in the note evidencing the contractor's indebtedness to the bank. *Cherokee Carpet Mills, Inc. v. Worthen Bank & Trust Co.*, 262 Ark. 776, 561 S.W.2d 310 (1978) (decision under prior law).

Superiority of Rights.

One cannot obtain a superior property right than its assignor. *First Nat'l Bank v. Massachusetts Gen. Life Ins. Co.*, 296 Ark.

28, 752 S.W.2d 1 (1988) (decision under prior law). 1093, 449 S.W.2d 922 (1970) (decisions under prior law).

Cited: Wawak v. Stewart, 247 Ark.

4-9-405. Modification of assigned contract.

(a) A modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor. This subsection is subject to subsections (b)-(d).

(b) Subsection (a) applies to the extent that:

(1) the right to payment or a part thereof under an assigned contract has not been fully earned by performance; or

(2) the right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under § 4-9-406(a).

(c) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(d) This section does not apply to an assignment of a health-care-insurance receivable.

History. Acts 2001, No. 1439, § 1.

4-9-406. Discharge of account debtor — Notification of assignment — Identification and proof of assignment — Restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.

(a) Subject to subsections (b)-(i), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) Subject to subsection (h), notification is ineffective under subsection (a):

(1) if it does not reasonably identify the rights assigned;

(2) to the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this chapter; or

(3) at the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) a portion has been assigned to another assignee; or

(C) the account debtor knows that the assignment to that assignee is limited.

(c) Subject to subsection (h), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a).

(d) Except as otherwise provided in subsection (e) and §§ 4-2A-303 and 4-9-407, and subject to subsection (h), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

(1) prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) Subsection (d) does not apply to the sale of a payment intangible or promissory note.

(f) Except as otherwise provided in §§ 4-2A-303 and 4-9-407 and subject to subsections (h) and (i), a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) Subject to subsection (h), an account debtor may not waive or vary its option under subsection (b)(3).

(h) This section is subject to law other than this chapter which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(i) This section does not apply to an assignment of a health-care-insurance receivable. Subsections (d) and (f) do not apply to assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in:

(1) a right the assignment or transfer of which is prohibited or restricted by § 11-9-110(a).

(2) a claim or right to receive amounts (whether by suit or agreement and whether as lump sums or as periodic payments) as damages (other than punitive damages) on account of personal physical injuries or physical sickness.

(3) a claim or right to receive benefits under a special needs trust as described in 42 U.S.C. § 1396p(d)(4).

(j) Except to the extent otherwise provided in subsection (i), this section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this state unless the provision is contained in a statute of this state, refers expressly to this section and states that the provision prevails over this section.

History. Acts 2001, No. 1439, § 1.

4-9-407. Restrictions on creation or enforcement of security interest in leasehold interest or in lessor's residual interest.

(a) Except as otherwise provided in subsection (b), a term in a lease agreement is ineffective to the extent that it:

(1) prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(b) Except as otherwise provided in § 4-2A-303(7), a term described in subsection (a)(2) is effective to the extent that there is:

(1) a transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) a delegation of a material performance of either party to the lease contract in violation of the term.

(c) The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially

changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of § 4-2A-303(4) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor.

History. Acts 2001, No. 1439, § 1.

4-9-408. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.

(a) Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) would impair the creation, attachment, or perfection of a security interest; or

(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.

(c) A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) would impair the creation, attachment, or perfection of a security interest; or

(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) would be effective under law

other than this chapter but is ineffective under subsection (a) or (c), the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

(1) is not enforceable against the person obligated on the promissory note or the account debtor;

(2) does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;

(3) does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;

(5) does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(e) Except to the extent otherwise provided in subsection (f), this section prevails over any inconsistent provision of an existing or future statute, rule or regulation of this state unless the provision is contained in a statute of this state, refers expressly to this section and states that the provision prevails over this section.

(f) Subsections (a) and (c) do not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in:

(1) a right the assignment or transfer of which is prohibited or restricted by § 11-9-110(a).

(2) a claim or right to receive amounts (whether by suit or agreement and whether as lump sums or as periodic payments) as damages (other than punitive damages) on account of personal physical injuries or physical sickness.

(3) a claim or right to receive benefits under a special needs trust as described in 42 U.S.C. § 1396p(d)(4).

History. Acts 2001, No. 1439, § 1.

4-9-409. Restrictions on assignment of letter-of-credit rights ineffective.

(a) A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest

in a letter-of-credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice:

(1) would impair the creation, attachment, or perfection of a security interest in the letter-of-credit right; or

(2) provides that the assignment or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right.

(b) To the extent that a term in a letter of credit is ineffective under subsection (a) but would be effective under law other than this chapter or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter-of-credit right:

(1) is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary;

(2) imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary; and

(3) does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party.

History. Acts 2001, No. 1439, § 1.

PART 5 — FILING

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

Cross References. Filing requirements for transmitting utilities, § 4-19-101 et seq.

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SUBPART 1

FILING OFFICE — CONTENTS AND EFFECTIVENESS OF FINANCING STATEMENT

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4-9-501. Filing office.	comes bound by security agreement.
4-9-502. Contents of financing statement — — Record of mortgage as financing statement — Time of filing financing statement.	4-9-509. Persons entitled to file a record.
4-9-503. Name of debtor and secured party.	4-9-510. Effectiveness of filed record.
4-9-504. Indication of collateral.	4-9-511. Secured party of record.
4-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.	4-9-512. Amendment of financing statement.
4-9-506. Effect of errors or omissions.	4-9-513. Termination statement.
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	4-9-516. What constitutes filing — Effectiveness of filing.
	4-9-517. Effect of indexing errors.
	4-9-518. Claim concerning inaccurate or wrongfully filed record.

4-9-501. Filing office.

(a) Except as otherwise provided in subsection (b), if the local law of this state governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) the office designated for the filing or recording of a record of a mortgage on the related real property, if:

(A) the collateral is as-extracted collateral or timber to be cut; or

(B) the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(2) the office of the circuit clerk in the county in which the debtor is located in this state if the debtor is engaged in farming operations and the collateral is equipment used in farming operations, or farm products, or accounts arising from the sale of farm products; or

(3) the office of the Secretary of State, in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the Secretary of State. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Accounts.
Bankruptcy.
Conditional sales contracts.
Consumer goods.
Filing.
Fixtures.
Knowledge.
Personal property.
Places of business.

Accounts.

Assignees of accounts receivable must file their interest both centrally with the secretary of state and locally with the clerk of the circuit court. *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972), cert. denied, 410 U.S. 909, 93 S. Ct. 963, 35 L. Ed. 2d 270 (1973) (decision under prior law).

Where the evidence established that out of the amount listed by the contractor as accounts receivable, approximately 50 percent of this amount constituted retainage on construction contracts and which were listed on the contractor's balance sheet as accounts receivable, and where, since the contractor did not complete its work on any projects after it filed bankruptcy, the retainage proved to be uncollectible due to various counterclaims and setoffs, the district court correctly included the retainage in the contractor's total outstanding accounts. *Davidson v. Union Nat'l Bank*, 605 F.2d 397 (8th Cir. 1979) (decision under prior law).

Bankruptcy.

Although creditor failed to perfect security interest by failing to comply with former § 4-9-401(1)(c), the security interest was a transfer by the debtor of an interest in property, and a preference which could be avoided in a bankruptcy action. *International Ventures, Inc. v. Block Properties*, 214 Bankr. 590 (Bankr. E.D. Ark. 1997) (decision under prior law).

Conditional Sales Contracts.

The conditional sale contract for carpeting sold to a defendant for installation in real estate covered by a deed of trust should have been filed in the office where the deed of trust was recorded to be valid as against the interest of the holder of the deed of trust. *United States v. Baptist*

Golden Age Home, 226 F. Supp. 892 (W.D. Ark. 1964) (decision under prior law).

Where person who sold equipment to the defendant under a conditional sale contract did not record or file the contract as provided by this section, he had only an unperfected security interest in the equipment which did not take priority over the after-acquired property clause in a deed of trust to the real estate where the equipment was placed. *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964) (decision under prior law).

Consumer Goods.

Where a debtor's use of a video cassette recorder was primarily personal, even though the debtor made some business use of it, the recorder was properly classified as consumer goods such that the creditor's single filing of its security interest was sufficient to perfect its security interest under this chapter. *Walloch TV & Appliances, Inc. v. McFadden*, 18 Bankr. 758 (Bankr. E.D. Ark. 1982) (decision under prior law).

Filing.

Where the taxpayer assigned its right to be paid under a construction contract to the predecessor of a bank as collateral for loans, and bank attempted to protect its security interest by filing a financing statement locally in county of its place of business but did not file centrally, in the office of the secretary of state of taxpayer's state, the government had no notice or knowledge of the bank's interest as the bank did not perfect or "protect" its security interests under this section and the government's tax lien had priority over the bank's imperfect security interest. *United States v. Ed Lusk Constr. Co.*, 504 F.2d 328 (10th Cir. 1974) (decision under prior law).

Large motel and restaurant signs anchored deep in concrete were so clearly fixtures that purchasers of the motel and restaurant had the right to rely on the records in the office of the circuit clerk of the county, where filings covering fixtures were to be made, to determine if a lien was in existence at the time of their purchase; under this chapter, a good faith filing made in the wrong place was not constructive notice to them, but only to any person

who had knowledge of the contents of such financing statement. *Cummings, Inc. v. Beardsley*, 271 Ark. 596, 609 S.W.2d 66 (1980) (decision under prior law).

Although bank filed first, it was not the first to file correctly, which was required under this chapter in order for it to have priority. *Affiliated Food Stores, Inc. v. F & M Bank*, 300 Ark. 450, 780 S.W.2d 20 (1989) (decision under prior law).

Fixtures.

A "fixture" is personal property which by reason of annexation to real property has become a part of the realty because of the nature of the surrounding structures or the impossibility of removal without substantial damage to the realty. In *re Factory Homes Corp.*, 333 F. Supp. 126 (W.D. Ark. 1971) (decision under prior law).

The term "trade fixture" is an exception to the classification "fixture," and in the cases in which the term is discussed it is generally stated under this chapter that a "trade fixture" remains the property of the business, not the owner of the real property, and is thus not a "fixture." In *re Factory Homes Corp.*, 333 F. Supp. 126 (W.D. Ark. 1971) (decision under prior law).

Referee in bankruptcy properly denied secured claim based upon times in security agreement which were trade fixtures and not fixtures within the meaning of this section where creditor filed security agreement with secretary of state in compliance with this section but subsequent to the filing of an involuntary petition in bankruptcy by debtor and thereby created no lien by virtue of such security interest. In *re Factory Homes Corp.*, 333 F. Supp. 126 (W.D. Ark. 1971) (decision under prior law).

Where a debtor annexed a building on the real property for the sole purpose of operating his business, and the building was not annexed with the intention of making the building a permanent addition to the realty, the building also constituted a trade fixture and remained personal property under this chapter. In *re Hot Shots Burgers & Fries, Inc.*, 147 Bankr. 484 (Bankr. E.D. Ark. 1992) (decision under prior law).

Knowledge.

An FHA lien under a deed of trust not meeting filing requirements covering an

apartment house and its furniture given by a partnership had priority over the purchase money lien of the corporation which sold the furniture to the partnership where one of the partners was also an officer of the corporation and the dominant figure in both the corporation and the partnership. *United States v. Thompson*, 272 F. Supp. 774 (E.D. Ark. 1967), *aff'd*, 408 F.2d 1075 (8th Cir. 1969) (decision under prior law).

"Knowledge of the contents" means actual rather than constructive knowledge. *Affiliated Food Stores, Inc. v. F & M Bank*, 300 Ark. 450, 780 S.W.2d 20 (1989) (decision under prior law).

Personal Property.

Filing in real estate records does not constitute notice as to personal property, and actual knowledge is required under this subtitle, § 4-1-201. In *re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965) (decision under prior law).

Places of Business.

Where a debtor farm supply business used a warehouse for over four years as its distribution center, the warehouse was listed as one of the company's business addresses in financing statements, and the warehouse performed an integral part of the debtor's business, the warehouse constituted a "place of business" within the meaning of former § 4-9-401(1)(c); accordingly, where the debtor owned two retail outlets in one county and the warehouse was located in a different county, the filing of the financing statements only with the Secretary of State was sufficient under former § 4-9-401(1)(c) to perfect the creditors' security interests. *American Cyanamid v. McCrary's Farm Supply, Inc.*, 705 F.2d 330 (8th Cir. 1983) (decision under prior law).

A corporation is an organization which may be a debtor under this chapter. *Rice v. Fas Fax Corp.* (In *re Hot Shots Burgers & Fries, Inc.*), 183 Bankr. 848 (Bankr. E.D. Ark. 1995) (decision under prior law).

Where individuals, rather than the corporation, were held to be the debtors, the proper place to file the financing statement under this chapter was in the office of the secretary of state and, because the individuals had no place of business, in the county in which the debtors resided. *Rice v. Fas Fax Corp.* (In *re Hot Shots*

Burgers & Fries, Inc.), 183 Bankr. 848 (Bankr. E.D. Ark. 1995) (decision under prior law).

Cited: *Caplinger v. Patty*, 398 F.2d 471 (8th Cir. 1968); *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969); *Richardson v. United States*, 358 F. Supp. 994 (E.D. Ark. 1973); *Findley Mach. Co. v. Miller*, 3 Ark. App. 264, 625 S.W.2d 542 (1981); *Limerick v. Limerick* (In re Answerfone, Inc.), 48 Bankr. 24 (Bankr. E.D. Ark. 1985); *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 60 Bankr. 500 (Bankr. W.D. Ark. 1986); *Womack v.*

Newman Fixture Co., 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990); *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990); *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993); *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994); *Rice v. Fas Fax Corp.* (In re Hot Shots Burgers & Fries, Inc.), 169 Bankr. 920 (Bankr. E.D. Ark. 1994); *In re Morrilton Plastics Prods., Inc.*, 177 Bankr. 622 (Bankr. E.D. Ark. 1995) (decisions under prior law).

4-9-502. Contents of financing statement — Record of mortgage as financing statement — Time of filing financing statement.

(a) Subject to subsection (b), a financing statement is sufficient only if it:

- (1) provides the name of the debtor;
- (2) provides the name of the secured party or a representative of the secured party; and
- (3) indicates the collateral covered by the financing statement.

(b) Except as otherwise provided in § 4-9-501(b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) and also:

- (1) indicate that it covers this type of collateral;
- (2) indicate that it is to be filed for record in the real property records;
- (3) provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and

(4) if the debtor does not have an interest of record in the real property, provide the name of a record owner.

(c) A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if:

- (1) the record indicates the goods or accounts that it covers;
- (2) the goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut;
- (3) the record satisfies the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and
- (4) the record is recorded.

(d) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Description of collateral.
Execution of security agreement.
Financing statements.
Future advances.

Description of Collateral.

Security agreements and financing statements establishing liens on growing crops which identified the subject of the liens as "7 acres of cotton and 53 acres of soybeans" to be produced on the lands of certain owners and similar designations of crops to be grown on other lands without describing the lands except by reference to the owners thereof, without specifying whether the debtor would grow exactly the specified acreage of specific crops, and whether or not there would be others growing similar crops on such lands, were insufficient to identify the subject of the security agreements. *Piggott State Bank v. Pollard Gin Co.*, 243 Ark. 159, 419 S.W.2d 120 (1967) (decision under prior law).

A trial court erred in ruling that a description of the subject of a security agreement as "Company owned inventory of" and giving the name and address of the company was insufficient as a matter of law. *Security Tire & Rubber Co. v. Hlass*, 246 Ark. 1113, 441 S.W.2d 91 (1969) (decision under prior law).

This section and former § 4-9-203 clearly require some type of a description of the land concerned, and where the description in a combined financing statement and security agreement on crops contained an accurate legal description of certain farm lands but omitted other parcels of land on which the borrower planted crops, was insufficient as to the real estate not described. *People's Bank v. Pioneer Food Indus., Inc.*, 253 Ark. 277, 486 S.W.2d 24 (1972) (decision under prior law).

Where the only land description was the statement that the property would be located at the Greenway Elevator Company at Greenway, Arkansas, which was identified only by a post office box number, the description was insufficient, to meet Uniform Commercial Code requirements for

descriptions of real estate. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

Nothing in the statutes or case law indicates that a full legal description of real estate is required in a financing statement covering crops under the pre-2001 version of this chapter; thus where the information in the financing statement, together with inquiry suggested therein, would enable a stranger to the transaction to identify the crops, the filing of the financing statement perfected the government's security interest in the crops. *United States v. Oakley*, 483 F. Supp. 762 (E.D. Ark. 1980) (decision under prior law).

Description of collateral in security agreement and financial statement that it included all crops and other plant products planted or growing on the farm of Alois Ledwig of approximately 260 acres located in White County, Arkansas approximately 3½ miles southeast of the town of McRae was a sufficient description of the collateral under the pre-2001 version of this chapter. *United States v. Oakley*, 483 F. Supp. 762 (E.D. Ark. 1980) (decision under prior law).

Financing statement which neither indicated where equipment could be located nor disclosed the name of the business where equipment was to be used fell short of the minimum requirement for collateral description under the pre-2001 version of this chapter. *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990) (decision under prior law).

Where fixture company claimed that description of collateral contained in bank's financing statement was insufficient to give notice to a third party it was proper under the pre-2001 version of this chapter to consider fixture company's actual knowledge concerning the collateral in determining the sufficiency of the description. *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990) (decision under prior law).

A description that only describes the debtor's name and the county and state where the real estate is located is not a sufficient description. *Schieffler v. First Nat'l Bank (In re Peeler)*, 145 Bankr. 973 (Bankr. E.D. Ark. 1992) (decision under prior law).

Execution of Security Agreement.

Possession of tractor by alleged security party was actually held pursuant to a sale and not a pledge even though a financing statement was filed where no security agreement was executed and alleged secured party did not take possession of the tractor at the time the financing statement was executed. *Gibbs v. King*, 263 Ark. 338, 564 S.W.2d 515 (1978) (decision under prior law).

Financing Statements.

A financing statement, standing alone, does not create a security interest in the debtor's property under the pre-2001 version of this chapter, but merely serves notice that the named creditor may have such an interest. *General Elec. Credit Corp. v. Bankers Com. Corp.*, 244 Ark. 984, 429 S.W.2d 60 (1968) (decision under prior law).

Where the financing statements identified the debtors by their business trade company names, and not by their individual names, the financing statements did not sufficiently identify the individual debtors under the pre-2001 version of this chapter. *In re Wallace*, 61 Bankr. 54 (Bankr. W.D. Ark. 1986) (decision under prior law).

Substantial compliance under former § 4-9-402(8) pertains to the formal requisites of a financing statement, not a continuation statement. *Worthen Bank & Trust Co. v. National Bank of Commerce (In re Hilyard Drilling Co.)*, 74 Bankr. 125 (W.D. Ark. 1986), *aff'd*, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

Statement filed failed significantly to adhere to requirements under the pre-2001 version of this chapter for continuation of its priority based upon prior statement. *Worthen Bank & Trust Co. v. National Bank of Commerce (In re Hilyard Drilling Co.)*, 74 Bankr. 125 (W.D. Ark. 1986), *aff'd*, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

When a debtor's name is incorrectly listed on a financial statement, the test under the pre-2001 version of this chapter is whether a reasonable search under the debtor's true name would reveal the filing, and if so, then the person searching is on notice to inquire further to discover the debtor's correct identity. *Heckathorn Constr. Co. v. Bass Mechanical Contractors*, 84 Bankr. 1009 (Bankr. W.D. Ark. 1988) (decision under prior law).

The determination of whether financing statements are seriously misleading is a question of fact which must be decided on a case-by-case basis. *Heckathorn Constr. Co. v. Bass Mechanical Contractors*, 84 Bankr. 1009 (Bankr. W.D. Ark. 1988) (decision under prior law).

Financing statement held not to substantially comply with the requirements for a continuation statement under the pre-2001 version of this chapter. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

Future Advances.

Where a bank loaned money with a financing statement and chattel mortgage covering future advances being filed, and subsequently others loaned debtor money acquiring liens, the bank had first priority when the debtor failed to meet payments and its property had to be sold, notwithstanding the debtor had payed off the first loan to bank, since it never was out of debt to bank. *Associated Bus. Inv. Corp. v. First Nat'l Bank*, 264 Ark. 611, 573 S.W.2d 328 (1978) (decision under prior law).

Cited: *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969); *In re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965); *Davidson v. Union Nat'l Bank*, 605 F.2d 397 (8th Cir. 1979); *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981); *Findley Mach. Co. v. Miller*, 3 Ark. App. 264, 625 S.W.2d 542 (1981); *Davidson v. Lonoke Prod. Credit Ass'n*, 695 F.2d 1115 (8th Cir. 1982); *United States v. Davidson*, 14 Ark. App. 194, 686 S.W.2d 455 (1985); *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 60 Bankr. 500 (Bankr. W.D. Ark. 1986) (decisions under prior law).

4-9-503. Name of debtor and secured party.

(a) A financing statement sufficiently provides the name of the debtor:

(1) if the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized;

(2) if the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate;

(3) if the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

(A) provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one (1) or more of the same settlors; and

(B) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust; and

(4) in other cases:

(A) if the debtor has a name, only if it provides the individual or organizational name of the debtor; and

(B) if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

(b) A financing statement that provides the name of the debtor in accordance with subsection (a) is not rendered ineffective by the absence of:

(1) a trade name or other name of the debtor; or

(2) unless required under subsection (a)(4)(B), names of partners, members, associates, or other persons comprising the debtor.

(c) A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor.

(d) Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement.

(e) A financing statement may provide the name of more than one (1) debtor and the name of more than one (1) secured party.

History. Acts 2001, No. 1439, § 1.

CASE NOTES**ANALYSIS**

After-acquired property.

Attachment and enforceability of security interest.

After-Acquired Property.

Where bank held security interest in assets, both current and after-acquired, of debtors' business and debtors subsequently incorporated but the bank failed

to obtain a new security agreement or financing statement in the name of the corporation, and no facts were shown to warrant disregarding the corporate entity, the bank had no security interest in property acquired after incorporation under the pre-2001 version of this chapter, and lender who funded purchase of new inventory after incorporation had valid first lien in new inventory. *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decision under prior law).

Attachment and Enforceability of Security Interest.

The language of former § 4-9-402(7) cannot properly be construed to dispense with the specific requirements of former § 4-9-203(1) regarding the enforceability of a security interest because, § 4-9-402(7) assumes the existence of a security interest to perfect. *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decision under prior law).

4-9-504. Indication of collateral.

A financing statement sufficiently indicates the collateral that it covers if the financing statement provides:

- (1) a description of the collateral pursuant to § 4-9-108; or
- (2) an indication that the financing statement covers all assets or all personal property.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Purpose.

The intent of this section is to permit a lessor, for example, to file a financing statement as a precautionary measure, even while contending that the lease is a

true lease for which no financing statement is actually required. *Bell v. Itek Leasing Corp.*, 262 Ark. 22, 555 S.W.2d 1 (1977) (decision under prior law).

4-9-505. Filing and compliance with other statutes and treaties for consignments, leases, other bailments, and other transactions.

(a) A consignor, lessor, or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note may file a financing statement, or may comply with a statute or treaty described in § 4-9-311(a), using the terms “consignor”, “consignee”, “lessor”, “lessee”, “bailor”, “bailee”, “licensor”, “licensee”, “owner”, “registered owner”, “buyer”, “seller”, or words of similar import, instead of the terms “secured party” and “debtor”.

(b) This part applies to the filing of a financing statement under subsection (a) and, as appropriate, to compliance that is equivalent to filing a financing statement under § 4-9-311(b), but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, licensor, owner, or buyer which attaches to the collateral is perfected by the filing or compliance.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Purpose.

The intent of this section is to permit a lessor, for example, to file a financing statement as a precautionary measure, even while contending that the lease is a

true lease for which no financing statement is actually required. *Bell v. Itek Leasing Corp.*, 262 Ark. 22, 555 S.W.2d 1 (1977) (decision under prior law).

4-9-506. Effect of errors or omissions.

(a) A financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading.

(b) Except as otherwise provided in subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 4-9-503(a) is seriously misleading.

(c) If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with § 4-9-503(a), the name provided does not make the financing statement seriously misleading.

(d) For purposes of § 4-9-508(b), the "debtor's correct name" in subsection (c) means the correct name of the new debtor.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Effect of Errors.

Financing statement containing error in debtor's address was sufficient under the pre-2001 version of this chapter because error was minor, collateral was described in terms of a general commercial code category, and party claiming insufficiency of description had actual knowledge concerning the collateral and the location of debtor's business that prevented it from being misled by the error. *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989), modified on reh'g, 27 Ark. App. 123A, 785 S.W.2d 226 (1990) (decision under prior law).

It was a minor error, not seriously misleading commensurate with former § 4-9-402(8), when the name given for the debtor on a financing statement was

"M.P.G. Enterprises/Al MacKenzie Const. Mgmt." when in fact the name of the debtor was "M.P.G. Enterprises, Inc." *Scott Truck & Tractor Co. v. Alma Tractor & Equip., Inc.*, 72 Ark. App. 79, 35 S.W.3d 815 (2000) (decision under prior law).

The test under the pre-2001 version of this chapter of whether an error in the debtor's name in a financing statement is a minor error that is not seriously misleading is whether it would not prevent a reasonable diligent searcher from discovering the financing statement when the search is made under the correct name of the debtor, and each case must be decided on the basis of its own facts. *Scott Truck & Tractor Co. v. Alma Tractor & Equip., Inc.*, 72 Ark. App. 79, 35 S.W.3d 815 (2000) (decision under prior law).

4-9-507. Effect of certain events on effectiveness of financing statement.

(a) A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise dis-

posed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

(b) Except as otherwise provided in subsection (c) and § 4-9-508, a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under § 4-9-506.

(c) If a debtor so changes its name that a filed financing statement becomes seriously misleading under § 4-9-506:

(1) the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four (4) months after, the change; and

(2) the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four (4) months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four (4) months after the change.

History. Acts 2001, No. 1439, § 1.

4-9-508. Effectiveness of financing statement if new debtor becomes bound by security agreement.

(a) Except as otherwise provided in this section, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral.

(b) If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under subsection (a) to be seriously misleading under § 4-9-506:

(1) the financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four (4) months after, the new debtor becomes bound under § 4-9-203(d); and

(2) the financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four (4) months after the new debtor becomes bound under § 4-9-203(d) unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time.

(c) This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under § 4-9-507(a).

History. Acts 2001, No. 1439, § 1.

4-9-509. Persons entitled to file a record.

(a) A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) the debtor authorizes the filing in an authenticated record or pursuant to subsection (b) or (c); or

(2) the person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

(1) the collateral described in the security agreement; and

(2) property that becomes collateral under § 4-9-315(a)(2), whether or not the security agreement expressly covers proceeds.

(c) By acquiring collateral in which a security interest or agricultural lien continues under § 4-9-315(a)(1), a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and property that becomes collateral under § 4-9-315(a)(2).

(d) A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) the secured party of record authorizes the filing; or

(2) the amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by § 4-9-513(a) or (c), the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed.

(e) If there is more than one (1) secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under subsection (d).

History. Acts 2001, No. 1439, § 1.

4-9-510. Effectiveness of filed record.

(a) A filed record is effective only to the extent that it was filed by a person that may file it under § 4-9-509.

(b) A record authorized by one (1) secured party of record does not affect the financing statement with respect to another secured party of record.

(c) A continuation statement that is not filed within the six-month period prescribed by § 4-9-515(d) is ineffective.

History. Acts 2001, No. 1439, § 1.

4-9-511. Secured party of record.

(a) A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. If an initial financing statement is filed under § 4-9-514(a), the assignee named in the initial financing statement is the secured party of record with respect to the financing statement.

(b) If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under § 4-9-514(b), the assignee named in the amendment is a secured party of record.

(c) A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person.

History. Acts 2001, No. 1439, § 1.

4-9-512. Amendment of financing statement.

(a) Subject to § 4-9-509, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to subsection (e), otherwise amend the information provided in, a financing statement by filing an amendment that:

(1) identifies, by its file number, the initial financing statement to which the amendment relates; and

(2) if the amendment relates to an initial financing statement filed in a filing office described in § 4-9-501(a) (1), provides the date and time that the initial financing statement was filed and the information specified in § 4-9-502(b).

(b) Except as otherwise provided in § 4-9-515, the filing of an amendment does not extend the period of effectiveness of the financing statement.

(c) A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment.

(d) A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment.

(e) An amendment is ineffective to the extent it:

(1) purports to delete all debtors and fails to provide the name of a debtor to be covered by the financing statement; or

(2) purports to delete all secured parties of record and fails to provide the name of a new secured party of record.

History. Acts 2001, No. 1439, § 1.

4-9-513. Termination statement.

(a) A secured party shall cause the secured party of record for a financing statement to file a termination statement for the financing statement if the financing statement covers consumer goods and:

(1) there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) the debtor did not authorize the filing of the initial financing statement.

(b) To comply with subsection (a), a secured party shall cause the secured party of record to file the termination statement:

(1) within one (1) month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value; or

(2) if earlier, within twenty (20) days after the secured party receives an authenticated demand from a debtor.

(c) In cases not governed by subsection (a), within twenty (20) days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if:

(1) except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value;

(2) the financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation;

(3) the financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession; or

(4) the debtor did not authorize the filing of the initial financing statement.

(d) Except as otherwise provided in § 4-9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective. Except as otherwise provided in § 4-9-510, for purposes of §§ 4-9-519(g), 4-9-522(a), and 4-9-523(c), the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Cited: General Elec. Credit Corp. v. Bank, 265 Ark. 668, 580 S.W.2d 465 (1979) Bankers Com. Corp., 244 Ark. 984, 429 S.W.2d 60 (1968); Hackworth v. First Nat'l

4-9-514. Assignment of powers of secured party of record.

(a) Except as otherwise provided in subsection (c), an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party.

(b) Except as otherwise provided in subsection (c), a secured party of record may assign of record all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which:

(1) identifies, by its file number, the initial financing statement to which it relates;

(2) provides the name of the assignor; and

(3) provides the name and mailing address of the assignee.

(c) An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under § 4-9-502(c) may be made only by an assignment of record of the mortgage in the manner provided by law of this state other than this subtitle.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Noncompliance.

In an action to foreclose real estate mortgage and security agreement, the failure of the assignee or assignor of the security agreement to comply with this

section did not affect the rights of the assignee's receiver against debtors. *Ragge v. Bryan*, 249 Ark. 164, 458 S.W.2d 403 (1970) (decision under prior law).

4-9-515. Duration and effectiveness of financing statement — Effect of lapsed financing statement.

(a) Except as otherwise provided in subsections (b), (e), (f), and (g), a filed financing statement is effective for a period of five (5) years after the date of filing.

(b) Except as otherwise provided in subsections (e), (f), and (g), an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of thirty (30) years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction.

(c) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (d). Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(d) A continuation statement may be filed only within six (6) months before the expiration of the five-year period specified in subsection (a) or the thirty-year period specified in subsection (b), whichever is applicable.

(e) Except as otherwise provided in § 4-9-510, upon timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five (5) years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. Upon the expiration of the five-year period, the financing statement lapses in the same manner as provided in subsection (c), unless, before the lapse, another continuation statement is filed pursuant to subsection (d). Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(f) If a debtor is a transmitting utility and a filed financing statement so indicates, the financing statement is effective until a termination statement is filed.

(g) A record of a mortgage that is effective as a financing statement filed as a fixture filing under § 4-9-502(c) remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Continuation statements.
Duration of filing.

Continuation Statements.

Under former § 4-9-403, there are four basic elements for filing a continuation statement: (1) The continuation statement may be filed within six months prior to the expiration date of the original filing; (2) the continuation statement is to be signed by the secured party; (3) the continuation statement must identify the original statement by file number; and (4) the continuation statement must state that the original statement is still effective. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 60 Bankr. 500 (Bankr. W.D. Ark. 1986), *aff'd*, 74 Bankr. 125 (W.D. Ark. 1986) (decision under prior law).

Where the second financing statement, filed just before the first financing statement expired, contained the signature of the secured party, but did not contain any of the other elements necessary for filing a continuation statement, it was not a continuation statement under former § 4-9-403, and the second creditor who had filed a financing statement in the interim was entitled to priority. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 60 Bankr. 500

(Bankr. W.D. Ark. 1986), *aff'd*, 74 Bankr. 125 (W.D. Ark. 1986) (decision under prior law).

Where a continuation statement meets all of the requirements under former § 4-9-403, except the original document number was misstated by one number, the defect is not seriously misleading and is sufficient compliance with former § 4-9-403 to render the filing effective. *Vincent Gaines Implement Co. v. United States*, 71 Bankr. 14 (Bankr. E.D. Ark. 1986) (decision under prior law).

Finding under former § 4-9-403 that financing statement and continuation statement are separate documents which cannot be substituted for one another is not clearly erroneous. *Worthen Bank & Trust Co. v. National Bank of Commerce (In re Hilyard Drilling Co.)*, 74 Bankr. 125 (W.D. Ark. 1986), *aff'd*, 840 F.2d 596 (8th Cir. 1991) (decision under prior law).

To interpret former § 4-9-303(2) as providing that a security interest can be continuously perfected by consecutively filed financing statements contradicts the express language of former § 4-9-403(2). Former 4-9-303(2) is applicable to security interests that are originally perfected in one way and then subsequently perfected in some other way, without an intermedi-

ate unperfected period. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

Financing statement held not to substantially comply with the requirements for a continuation statement under former § 4-9-403. *Worthen Bank & Trust Co. v. Hilyard Drilling Co.*, 840 F.2d 596 (8th Cir. 1988) (decision under prior law).

Duration of Filing.

By virtue of the limitation period, a creditor did not have a perfected security interest under former § 4-9-403 in either an automobile or chattel paper after the expiration of the statutory period from the date the last financing statement was filed by the creditor. *Commercial Credit Corp. v. National Credit Corp.*, 251 Ark. 702, 473 S.W.2d 881 (1971) (decision under prior law).

Where collateral description states that "crops covered hereby are growing or are to be grown on" certain described real property, such language in the financing statement was sufficient to notify third parties that crops grown after that crop year were covered, and it should have

reasonably notified third parties that after-acquired property was part of the subject matter of the financing statement and further, that crops growing or to be grown on the real property would be subject to the security interest of the plaintiff for five years under former § 4-9-403, commencing on the date the financing statement was filed. *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981) (decision under prior law).

The crops grown each year by a debtor do not constitute separate items or types of collateral coming into existence so as to require designation on a financing statement of the years in which the crops are to be grown, since the time limits on the effectiveness of a financing statement found under former § 4-9-403 reasonably describe the years to which the financing statement, containing an after-acquired property clause dealing with crops, is applicable. *United States v. Riceland Foods, Inc.*, 504 F. Supp. 1258 (E.D. Ark. 1981) (decision under prior law).

Cited: *Barnett v. Borg-Warner Acceptance Corp.*, 488 F. Supp. 786 (E.D. Ark. 1980) (decisions under prior law).

4-9-516. What constitutes filing — Effectiveness of filing.

(a) Except as otherwise provided in subsection (b), communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) the record is not communicated by a method or medium of communication authorized by the filing office;

(2) an amount equal to or greater than the applicable filing fee is not tendered;

(3) the filing office is unable to index the record because:

(A) in the case of an initial financing statement, the record does not provide a name for the debtor;

(B) in the case of an amendment or correction statement, the record:

(i) does not identify the initial financing statement as required by § 4-9-512 or § 4-9-518, as applicable; or

(ii) identifies an initial financing statement whose effectiveness has lapsed under § 4-9-515;

(C) in the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not

previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name; or

(D) in the case of a record filed in the filing office described in § 4-9-501(a)(1), the record does not provide a sufficient description of the real property to which it relates;

(4) in the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record;

(5) in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) provide a mailing address for the debtor;

(B) indicate whether the debtor is an individual or an organization; or

(C) if the financing statement indicates that the debtor is an organization, provide:

(i) a type of organization for the debtor;

(ii) a jurisdiction of organization for the debtor; or

(iii) an organizational identification number for the debtor or indicate that the debtor has none;

(6) in the case of an assignment reflected in an initial financing statement under § 4-9-514(a) or an amendment filed under § 4-9-514(b), the record does not provide a name and mailing address for the assignee; or

(7) in the case of a continuation statement, the record is not filed within the six-month period prescribed by § 4-9-515(d).

(c) For purposes of subsection (b):

(1) a record does not provide information if the filing office is unable to read or decipher the information; and

(2) a record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by § 4-9-512, § 4-9-514, or § 4-9-518, is an initial financing statement.

(d) A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in subsection (b), is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files.

History. Acts 2001, No. 1439, § 1.

4-9-517. Effect of indexing errors.

The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record.

History. Acts 2001, No. 1439, § 1.

4-9-518. Claim concerning inaccurate or wrongfully filed record.

(a) A person may file in the filing office a correction statement with respect to a record indexed there under the person's name if the person believes that the record is inaccurate or was wrongfully filed.

(b) A correction statement must:

(1) identify the record to which it relates by:

(A) the file number assigned to the initial financing statement to which the record relates; and

(B) if the correction statement relates to a record filed in a filing office described in § 4-9-501(a)(1), the date that the initial financing statement was filed and the information specified in § 4-9-502(b);

(2) indicate that it is a correction statement; and

(3) provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

(c) The filing of a correction statement does not affect the effectiveness of an initial financing statement or other filed record.

History. Acts 2001, No. 1439, § 1.

SUBPART 2

DUTIES AND OPERATION OF FILING OFFICE

SECTION.

4-9-519. Numbering, maintaining, and indexing records — Communicating information provided in records.

4-9-520. Acceptance and refusal to accept record.

4-9-521. Uniform form of written financing statement and amendment.

SECTION.

4-9-522. Maintenance and destruction of records.

4-9-523. Information from filing office — Sale or license of records.

4-9-524. Delay by filing office.

4-9-525. Fees.

4-9-526. Filing office rules.

4-9-527. Duty to report.

4-9-519. Numbering, maintaining, and indexing records — Communicating information provided in records.

(a) For each record filed in a filing office, the filing office shall:

(1) assign a unique number to the filed record;

(2) create a record that bears the number assigned to the filed record and the date and time of filing;

(3) maintain the filed record for public inspection; and

(4) index the filed record in accordance with subsections (c), (d), and (e).

(b) Except as provided in subsection (i), a file number must include a digit that:

(1) is mathematically derived from or related to the other digits of the file number; and

(2) aids the filing office in determining whether a number communicated as the file number includes a single-digit or transpositional error.

(c) Except as otherwise provided in subsections (d) and (e), the filing office shall:

(1) index an initial financing statement according to the name of the debtor and index all filed records relating to the initial financing statement in a manner that associates with one another an initial financing statement and all filed records relating to the initial financing statement; and

(2) index a record that provides a name of a debtor which was not previously provided in the financing statement to which the record relates also according to the name that was not previously provided.

(d) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, it must be filed for record and the filing office shall index it:

(1) under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described; and

(2) to the extent that the law of this state provides for indexing of records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described.

(e) If a financing statement is filed as a fixture filing or covers as-extracted collateral or timber to be cut, the filing office shall index an assignment filed under § 4-9-514(a) or an amendment filed under § 4-9-514(b):

(1) under the name of the assignor as grantor; and

(2) to the extent that the law of this state provides for indexing a record of the assignment of a mortgage under the name of the assignee, under the name of the assignee.

(f) The filing office shall maintain a capability:

(1) to retrieve a record by the name of the debtor and:

(A) if the filing office is described in § 4-9-501(a)(1), by the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed; or

(B) if the filing office is described in § 4-9-501(a)(2), by the file number assigned to the initial financing statement to which the record relates; and

(2) to associate and retrieve with one another an initial financing statement and each filed record relating to the initial financing statement.

(g) The filing office may not remove a debtor's name from the index until one (1) year after the effectiveness of a financing statement naming the debtor lapses under § 4-9-515 with respect to all secured parties of record.

(h) Except as provided in subsection (i) the filing office shall perform the acts required by subsections (a)-(e) at the time and in the manner

prescribed by filing office rule, but not later than two business days after the filing office receives the record in question.

(i) Subsections (b) and (h) do not apply to a filing office described in § 4-9-501(a) (1).

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Duties of Filing Officer.

Where there was no recitation in the instrument that it was to be filed for record in the real estate records and it did not contain a description of the real estate sufficient to give constructive notice of a mortgage of the real estate, the circuit

clerk was not called upon to index the instrument as he would have if it had been a real estate mortgage. *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979) (decision under prior law).

4-9-520. Acceptance and refusal to accept record.

(a) A filing office shall refuse to accept a record for filing for a reason set forth in § 4-9-516(b) and may refuse to accept a record for filing only for a reason set forth in § 4-9-516(b).

(b) If a filing office refuses to accept a record for filing, it shall communicate to the person that presented the record the fact of and reason for the refusal and the date and time the record would have been filed had the filing office accepted it. The communication must be made at the time and in the manner prescribed by filing office rule but, in the case of a filing office described in § 4-9-501(a)(2), in no event more than two (2) business days after the filing office receives the record.

(c) A filed financing statement satisfying § 4-9-502(a) and (b) is effective, even if the filing office is required to refuse to accept it for filing under subsection (a). However, § 4-9-338 applies to a filed financing statement providing information described in § 4-9-516(b)(5) which is incorrect at the time the financing statement is filed.

(d) If a record communicated to a filing office provides information that relates to more than one (1) debtor, this part applies as to each debtor separately.

History. Acts 2001, No. 1439, § 1.

4-9-521. Uniform form of written financing statement and amendment.

(a) A filing office that accepts written records may not refuse to accept a written initial financing statement in the following form and format except for a reason set forth in § 4-9-516(b):

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

1c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

1d. TAX ID # SSN OR EIN ADD. INFO RE ORGANIZATION 1e. TYPE OF ORGANIZATION 1f. JURISDICTION OF ORGANIZATION 1g. ORGANIZATIONAL ID #, if any

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

2c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

2d. TAX ID # SSN OR EIN ADD. INFO RE ORGANIZATION 2e. TYPE OF ORGANIZATION 2f. JURISDICTION OF ORGANIZATION 2g. ORGANIZATIONAL ID #, if any

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S.P.) - Insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME

OR

3b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

3c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

5. ALTERNATIVE DESIGNATION (if applicable) ☐ REFINANCE ☐ CORRECTIVE/COMBINATOR ☐ RAILEE/ANALOG ☐ SELLER/BUYER ☐ ASG. LIEN ☐ NON-UCF FILING

6. THIS FINANCING STATEMENT IS IN THE BEST (or second) (or recording) IN THE BEST ☐ 7. CHECK TO REQUEST SEARCH REPORT(S) on Debtor(s) ☐ ALL Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

9. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME, SUFFIX

10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one name (11a or 11b) - do not abbreviate or combine names

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

11c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

11d. TAX ID #, SSN OR EIN

11e. TYPE OF ORGANIZATION

11f. JURISDICTION OF ORGANIZATION

11g. ORGANIZATIONAL ID #, if any

11h. NONE

12. ADDITIONAL SECURED PARTY'S or ASSIGNOR S/P'S NAME - Insert only one name (12a or 12b)

12a. ORGANIZATION'S NAME

OR

12b. INDIVIDUAL'S LAST NAME

FIRST NAME

MIDDLE NAME

SUFFIX

12c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

13. This FINANCING STATEMENT covers ☐ Debtor to be cut or ☐ re-attached collateral, or is filed as a ☐ Future Filing

14. Description of real estate:

15. Name and address of a RECORD OWNER of above-described real estate
(if Debtor does not have a record interest)

16. Additional collateral description:

17. Check only if applicable and check only one box.
Debtor is a ☐ Trust or ☐ Trustee acting with respect to property held in trust or ☐ Decedent's Estate

18. Check only if applicable and check only one box.
☐ Debtor is a TRANSMITTING UTILITY
☐ Filed in connection with a Manufactured Home Transaction — effective 30 years
☐ Filed in connection with a Public Finance Transaction — effective 30 years

(b) A filing office that accepts written records may not refuse to accept a written record in the following form and format except for a reason set forth in § 4-9-516(b):

UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE #

1b. This FINANCING STATEMENT AMENDMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS.

2. ☐ TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement.

3. ☐ CONTINUATION: Effectiveness of the Financing Statement identified above with respect to security interest(s) of the Secured Party authorizing this Continuation Statement is continued for the additional period provided by applicable law.

4. ☐ ASSIGNMENT (all or partial): Give name of assignee in item 7a or 7b and address of assignee in item 7c and also give name of assignor in item 9.

5. AMENDMENT (PARTY INFORMATION): This Amendment affects: ☐ Debtor or ☐ Secured Party of record. Check only one of these two boxes.

Also check one of the following three boxes and provide appropriate information in items 6 and/or 7.

☐ CHANGE name and/or address: Give current record name in item 6a or 6b; also give new name (if name change) in item 7a or 7b and/or new address (if address change) in item 7c. ☐ DELETE name: Give record name to be deleted in item 6a or 6b. ☐ ADD name: Complete item 7a or 7b, and also item 7c; also complete items 7d-7g (if applicable).

6. CURRENT RECORD INFORMATION:

6a. ORGANIZATION'S NAME

OR
6b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

7. CHANGED (NEW) OR ADDED INFORMATION:

7a. ORGANIZATION'S NAME

OR
7b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

7c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

7d. TAX ID #: SSN OR EIN ADD. INFO RE ORGANIZATION DEBTOR 7e. TYPE OF ORGANIZATION 7f. JURISDICTION OF ORGANIZATION 7g. ORGANIZATIONAL ID #, if any ☐ NONE

8. AMENDMENT (COLLATERAL CHANGE): check only one box.

Describe collateral ☐ deleted or ☐ added, or give entire ☐ revised collateral description, or descriptive collateral ☐ assigned.

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT (name of assignor, if this is an Assignment; if this is an Amendment authorized by a Debtor which adds collateral or adds the authorizing Debtor, or if this is a Termination authorized by a Debtor, check here ☐ and enter name of DEBTOR authorizing this Amendment.

9a. ORGANIZATION'S NAME

OR
9b. INDIVIDUAL'S LAST NAME FIRST NAME MIDDLE NAME SUFFIX

10. OPTIONAL FILER REFERENCE DATA

UCC FINANCING STATEMENT AMENDMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

11. INITIAL FINANCING STATEMENT FILE # (same as item 1a on Amendment form)		
12. NAME OF PARTY AUTHORIZING THIS AMENDMENT (same as item 9 on Amendment form)		
12a. ORGANIZATION'S NAME		
OR		
12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME, SUFFIX
13. Use this space for additional information		
THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY		

History. Acts 2001, No. 1439, § 1.

4-9-522. Maintenance and destruction of records.

(a) The filing office shall maintain a record of the information provided in a filed financing statement for at least one (1) year after the effectiveness of the financing statement has lapsed under § 4-9-515 with respect to all secured parties of record. The record must be retrievable by using the name of the debtor and:

(1) if the record was filed in the filing office described in § 4-9-501(a)(1), by using the file number assigned to the initial financing statement to which the record relates and the date and time that the record was filed; or

(2) if the record was filed in the filing office described in § 4-9-501(a)(2), by using the file number assigned to the initial financing statement to which the record relates.

(b) Except to the extent that a statute governing disposition of public records provides otherwise, the filing office immediately may destroy any written record evidencing a financing statement. However, if the filing office destroys a written record, it shall maintain another record of the financing statement which complies with subsection (a).

History. Acts 2001, No. 1439, § 1.

4-9-523. Information from filing office — Sale or license of records.

(a) If a person that files a written record requests an acknowledgment of the filing, the filing office shall send to the person an image of the record showing the number assigned to the record pursuant to § 4-9-519(a)(1) and the date and time of the filing of the record. However, if the person furnishes a copy of the record to the filing office, the filing office may instead:

(1) note upon the copy the number assigned to the record pursuant to § 4-9-519(a)(1) and the date and time of the filing of the record; and

(2) send the copy to the person.

(b) If a person files a record other than a written record, the filing office shall communicate to the person an acknowledgment that provides:

(1) the information in the record;

(2) the number assigned to the record pursuant to § 4-9-519(a)(1); and

(3) the date and time of the filing of the record.

(c) The filing office shall communicate or otherwise make available in a record the following information to any person that requests it:

(1) whether there is on file on a date and time specified by the filing office, but not a date earlier than three (3) business days before the filing office receives the request, any financing statement that:

(A) designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request;

(B) has not lapsed under § 4-9-515 with respect to all secured parties of record; and

- (C) if the request so states, has lapsed under § 4-9-515 and a record of which is maintained by the filing office under § 4-9-522(a);
- (2) the date and time of filing of each financing statement; and
- (3) the information provided in each financing statement.

(d) In complying with its duty under subsection (c), the filing office may communicate information in any medium. However, if requested, the filing office shall communicate information by issuing a record that can be admitted into evidence in the courts of this state without extrinsic evidence of its authenticity.

(e) The filing office shall perform the acts required by subsections (a)-(d) at the time and in the manner prescribed by filing office rule, but not later than two (2) business days after the filing office receives the request.

(f) At least weekly, the Secretary of State shall offer to sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed in it under this part, in every medium from time to time available to the filing office. This subsection shall apply only to records filed in a filing office described in § 4-9-501(a)(2).

History. Acts 2001, No. 1439, § 1.

4-9-524. Delay by filing office.

Delay by the filing office beyond a time limit prescribed by this part is excused if:

(1) the delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office; and

(2) the filing office exercises reasonable diligence under the circumstances.

History. Acts 2001, No. 1439, § 1.

4-9-525. Fees.

(a) Except as otherwise provided in subsection (e), the fee for filing and indexing a record, whether by paper or electronically, under this part, other than an initial financing statement of the kind described in § 4-9-502(c), is:

(1) Records filed only with the Secretary of State pursuant to § 4-9-501(a)(3), from July 1, 2001 through June 30, 2013 — sixteen dollars (\$16.00), for filing and indexing the initial financing statement and termination statements, if the record consists of one (1) page. On an after July 1, 2013 — twelve dollars (\$12.00), for filing and indexing the initial financing statement and termination statements, if the record consists of one (1) page;

(2) Records filed with circuit clerks pursuant to § 4-9-501(a)(2) — twelve dollars (\$12.00), for filing and indexing the initial financing statement and termination statements, if the record consists of one (1) page;

(3) Fifty cents (\$0.50) per page up to a maximum of one hundred dollars (\$100) if the record consists of more than one (1) page.

(b)(1) The fee for filing a continuation, whether with the Secretary of State or a circuit clerk, is six dollars (\$6.00).

(2) The fee for filing a termination statement, whether with the Secretary of State or a circuit clerk, is six dollars (\$6.00) if it pertains to the filing of a financing statement before July 28, 1995.

(3) The fee for each separate search, whether by the Secretary of State or a circuit clerk, is six dollars (\$6.00).

(4) The fee for filing an assignment, whether with the Secretary of State or a circuit clerk, is six dollars (\$6.00).

(5) The fee for filing a release, whether with the Secretary of State or a circuit clerk, is six dollars (\$6.00).

(6) The fee for filing an amendment, whether with the Secretary of State or a circuit clerk, is six dollars (\$6.00).

(c) The number of names required to be indexed does not affect the amount of the fee in subsection (a).

(d) The fee for issuing a certificate or for furnishing a copy of any record on file naming a particular debtor, is:

(1) Six dollars (\$6.00) if the record consists of one (1) page; and

(2) Fifty cents (\$0.50) per page for each page up to a maximum of one hundred dollars (\$100) if the records supplied consist of more than one (1) page.

(e) This section does not fix the fee with respect to a record of a mortgage which is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut under § 4-9-502(c). However, the recording and satisfaction fees that otherwise would be applicable to the record of the mortgage apply.

(f) The Secretary of State shall report periodically to the Treasurer of State the number of filing and indexing fees collected under subdivision (a)(1) during the period from July 1, 2001 through June 30, 2013, and the Treasurer of State shall deposit twelve dollars (\$12.00) of every such fee in a separate account for the benefit of those circuit clerks who qualify under this subsection. The proceeds in the account shall be distributed by the Treasurer of State at least quarterly to the county recorder cost fund of the counties of qualifying circuit clerks in the proportion that the total of the filing and indexing fees (other than fees charged solely for filing records related to collateral which is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer or crops growing or to be grown) collected by each qualifying clerk in calendar year 1999 under former chapter 9 of the Uniform Commercial Code bears to the total of those same filing and indexing fees collected by all qualified distributees. Said calculations shall be determined in a reasonable manner. The clerks qualified to share in these distributions shall be the circuit clerks of the counties who file with the Treasurer of State no later than September 1, 2001 a sworn

record stating the total amount of the relevant indexing and filing fees of the kind described in this subsection collected by said clerks in 1999, and the Treasurer of State shall use these sworn records in computing the pro rata share of each qualified distributee.

History. Acts 2001, No. 1439, § 1.

4-9-526. Filing office rules.

(a) The Secretary of State shall adopt and publish rules to implement this chapter. The filing office rules must be:

- (1) consistent with this chapter; and
- (2) adopted and published in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(b) To keep the filing office rules and practices of the filing office in harmony with the rules and practices of filing offices in other jurisdictions that enact substantially this part, and to keep the technology used by the filing office compatible with the technology used by filing offices in other jurisdictions that enact substantially this part, the Secretary of State, so far as is consistent with the purposes, policies, and provisions of this chapter, in adopting, amending, and repealing filing office rules, shall:

- (1) consult with filing offices in other jurisdictions that enact substantially this part; and
- (2) consult the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization; and
- (3) take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part.

History. Acts 2001, No. 1439, § 1.

4-9-527. Duty to report.

The Secretary of State shall report annually on or before October 1 to the Governor and General Assembly on the operation of the filing office. The report must contain a statement of the extent to which:

- (1) the filing office rules are not in harmony with the rules of filing offices in other jurisdictions that enact substantially this part and the reasons for these variations; and
- (2) the filing office rules are not in harmony with the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators, or any successor organization, and the reasons for these variations.

History. Acts 2001, No. 1439, § 1.

PART 6 — DEFAULT

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

RESEARCH REFERENCES

ALR. "Commercially reasonable" disposition of collateral required by UCC § 9-504(3). 7 ALR 4th 308.

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code § 9-504. 9 ALR 4th 552.

Failure of secured party to make, "commercially reasonable" disposition of collateral under UCC § 9-504(3) as bar. 10 ALR 4th 413.

Nature of collateral which secured party may sell or otherwise dispose of without giving notice to defaulting debtor under UCC § 9-504(3). 11 ALR 4th 1060.

Improper sale, removal, concealment, or disposal of property subject to security interest under UCC. 48 ALR 4th 819.

Public or private sale under UCC § 9-504(3). 60 ALR 4th 1012.

Right of secured party to take possession of collateral on default under UCC § 9-503. 25 ALR 5th 696.

Am. Jur. 68A Am. Jur. 2d, Secured Trans., § 556 et seq.

Ark. L. Notes. Flaccus, Repossession and Sale under Arkansas's Article 9, 1984 Ark. L. Notes 1.

Flaccus, Update: Repossession and Sale under Arkansas' Article Nine, etc., 1987 Ark. L. Notes 90.

Flaccus, Update: Repossession and Sale Under Arkansas's Article Nine, 1984 Ark. L. Notes 1, 1987 Ark. L. Notes 90, 1994 Ark. L. Notes 73.

Ark. L. Rev. Uniform Commercial Code

— Measure of Damages, 20 Ark. L. Rev. 391.

Commercial Law — Repossession of Chattels — Notice and Opportunity for Prior Hearings in Replevin, 26 Ark. L. Rev. 534.

Note, Secured Transactions in Arkansas, Bank of Bearden v. Simpson: Living with Both the Rebuttable Presumption and the Absolute Bar, 46 Ark. L. Rev. 475.

Notes, Henry v. Trickey: Article IX and the Noncomplying Secured Party's Quest for a Deficiency Judgment, 38 Ark. L. Rev. 200.

Notes, Thrower v. Union Lincoln-Mercury, Inc.: Taking a Trade-in on the Sale of Collateral, 38 Ark. L. Rev. 640.

Recent Developments, 49 Ark. L. Rev. 661.

C.J.S. 79 C.J.S. Supp., Secured Trans., § 144 et seq.

UALR L.J. Arkansas Law Survey, Looney, Business Law, 8 UALR L.J. 99.

Survey of Arkansas Law, Business Law, 1 UALR L.J. 118.

Notes, UCC Article 9 — Disposition of Repossessed Collateral Notice and Deficiency — A New Rule in Arkansas, Rhodes v. Oaklawn Bank, 279 Ark. 51, 648 S.W.2d 470, 6 UALR L.J. 585.

Adams, "Clear Title" for Farm Products: Congress and the Arkansas Legislature Attempt to Solve a Troublesome Problem, 10 UALR L.J. 619.

Survey, Debtor/Creditor Relations, 14 UALR L.J. 353.

CASE NOTES

ANALYSIS

Purpose.
Applicability.

Purpose.

One clear policy reason underlying the pre-2001 Article 9 default provisions was

the protection of post-default debtors from overbearing tactics and intimidation by secured parties. To insure that the debtor is fully apprised of his rights and fully aware of the process for the disposition of his property, the code contemplates that agreements and notices and modifications

relating to the sale be in writing. Walker v. Grant County Sav. & Loan Ass'n, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Applicability.

The provisions in the pre-2001 Article 9 default provisions were directed to those individuals who would have an interest in

seeing that the collateral is disposed of in the most productive manner possible, so that a surplus might be realized, which is all a debtor and junior creditor would be entitled to. Stotts v. Johnson, 302 Ark. 439, 791 S.W.2d 351 (1990) (decision under prior law).

SUBPART 1

DEFAULT AND ENFORCEMENT OF SECURITY INTEREST

SECTION.

- 4-9-601. Rights after default — Judicial enforcement — Consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.
- 4-9-602. Waiver and variance of rights and duties.
- 4-9-603. Agreement on standards concerning rights and duties.
- 4-9-604. Procedure if security agreement covers real property or fixtures.
- 4-9-605. Unknown debtor or secondary obligor.
- 4-9-606. Time of default for agricultural lien.
- 4-9-607. Collection and enforcement by secured party.
- 4-9-608. Application of proceeds of collection or enforcement — Liability for deficiency and right to surplus.
- 4-9-609. Secured party's right to take possession after default.
- 4-9-610. Disposition of collateral after default.
- 4-9-611. Notification before disposition of collateral.

SECTION.

- 4-9-612. Timeliness of notification before disposition of collateral.
- 4-9-613. Contents and form of notification before disposition of collateral: General.
- 4-9-614. Contents and form of notification before disposition of collateral: Consumer-goods transaction.
- 4-9-615. Application of proceeds of disposition — Liability for deficiency and right to surplus.
- 4-9-616. Explanation of calculation of surplus or deficiency.
- 4-9-617. Rights of transferee of collateral.
- 4-9-618. Rights and duties of certain secondary obligors.
- 4-9-619. Transfer of record or legal title.
- 4-9-620. Acceptance of collateral in full or partial satisfaction of obligation — Compulsory disposition of collateral.
- 4-9-621. Notification of proposal to accept collateral.
- 4-9-622. Effect of acceptance of collateral.
- 4-9-623. Right to redeem collateral.
- 4-9-624. Waiver.

4-9-601. Rights after default — Judicial enforcement — Consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

- (a) After default, a secured party has the rights provided in this part and, except as otherwise provided in § 4-9-602, those provided by agreement of the parties. A secured party:
 - (1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) if the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) A secured party in possession of collateral or control of collateral under § 4-9-104, § 4-9-105, § 4-9-106, or § 4-9-107 has the rights and duties provided in § 4-9-207.

(c) The rights under subsections (a) and (b) are cumulative and may be exercised simultaneously.

(d) Except as otherwise provided in subsection (g) and § 4-9-605, after default, a debtor and an obligor have the rights provided in this part and by agreement of the parties.

(e) If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

(1) the date of perfection of the security interest or agricultural lien in the collateral;

(2) the date of filing a financing statement covering the collateral; or

(3) any date specified in a statute under which the agricultural lien was created.

(f) A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this chapter.

(g) Except as otherwise provided in § 4-9-607(c), this part imposes no duties upon a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Purpose.

Alternative remedies.

Commercially reasonable sale.

Notice.

Writ of garnishment.

Written agreement.

Purpose.

This section is an apparent attempt by the drafters of the Uniform Commercial Code to require creditors to proceed either pursuant to the Uniform Commercial Code or pursuant to the equitable foreclosure laws and avoid any combination. *Bank of Bearden v. Simpson*, 305 Ark. 326, 808 S.W.2d 341 (1991) (decision under prior law).

Alternative Remedies.

Fact that plaintiff, in action for the unpaid balance on a house trailer, asked

for a judgment and sale or in the alternative for possession was not an election of inconsistent remedies in view of the provision in this section that rights and remedies are cumulative. *Williams v. Westinghouse Credit Corp.*, 250 Ark. 1065, 468 S.W.2d 761 (1971) (decision under prior law).

Bank was entitled to pursue its rights of set-off, repossession and sale simultaneously. *Neel v. Citizens First State Bank*, 28 Ark. App. 116, 771 S.W.2d 303 (1989) (decision under prior law).

Where a creditor sells personalty collateral in violation of the the pre-2001 version of the Uniform Commercial Code, the creditor can pursue the remainder of the debt by foreclosing against real property which also served as collateral, but the amount of the remaining debt would be no more than the difference between the reasonable value of the personalty at the time

of the sale and the amount of the obligation at the time the sale of the personalty occurred. *Bank of Bearden v. Simpson*, 305 Ark. 326, 808 S.W.2d 341 (1991) (decision under prior law).

Commercially Reasonable Sale.

Even if it could be said that the sales of limited partnership units were not commercially reasonable under the pre-2001 version of this chapter, debtor, after default, either waived the requirements of a commercially reasonable sale, or agreed that the sales proposed by each of the banks and the manner of making them were commercially reasonable, since neither the debtor nor his attorneys, all experts, suggested any other procedure for the sale, and that no action was taken by either debtor or his attorneys in his behalf to question either of the sales until some months later. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

Notice.

Where bank has repossessed a car on default by the buyer of his conditional sales contract, the dealer who sold the promissory note and conditional sales contract to the bank with an agreement to repurchase the contract for the amount due thereon if buyer of car should default did not waive his right to notice of the sale of the car after repossession by the bank by signing a printed assignment of the conditional sales contract (prepared by the bank) which recited that the dealer waived all notices to which he might otherwise have been entitled under the pre-2001 version of this chapter. *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), overruled on other grounds by *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987) (decision under prior law).

Where defendant, who was in default under a new and used automobile financing agreement, signed a disposal of collateral agreement about nine days after repossession of automobiles by the bank, defendant waived notification of terms, times, and places of sale of the repossessed automobiles. *Teeter Motor Co. v.*

First Nat'l Bank, 260 Ark. 764, 543 S.W.2d 938 (1976) (decision under prior law).

Where secured party commences separate actions against the personal property collateral and the real property collateral of the guarantor, the secured party is required to act in accordance with the notice requirements of the pre-2001 version of the Arkansas Commercial Code with respect to the personal property collateral and under former § 4-9-504(3), and failure to do so barred the secured party from foreclosing on the mortgage of the guarantor, securing the promissory note. *United States v. Dawson*, 929 F.2d 1336 (8th Cir. 1991) (decision under prior law).

Writ of Garnishment.

Writ of garnishment was not required by bank to take possession of collateral covered by a security agreement. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 971 S.W.2d 788 (1998) (decision under prior law).

Written Agreement.

The only reasonable interpretation of the "agreement" contemplated by former § 4-9-501 is an agreement in writing. *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

In order for a post-default agreement to establish the commercial reasonableness of a sale of collateral and to govern the notices relating to such sales as required by former § 4-9-501(3), it must be in writing. *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Cited: *Rose's Mobile Homes, Inc. v. Rex Fin. Corp.*, 383 F. Supp. 937 (W.D. Ark. 1974); *Bawcom v. Allis-Chalmers Credit Corp.*, 256 Ark. 569, 508 S.W.2d 741 (1974); *Everett v. Parts, Inc.*, 4 Ark. App. 213, 628 S.W.2d 875 (1982); *Brown v. Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983); *Thrower v. Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984); *Schieffler v. First Nat'l Bank (In re Peeler)*, 145 Bankr. 973 (Bankr. E.D. Ark. 1992); *Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 922 S.W.2d 718 (1996) (decisions under prior law).

4-9-602. Waiver and variance of rights and duties.

Except as otherwise provided in § 4-9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:

(1) Section 4-9-207(b)(4)(C), which deals with use and operation of the collateral by the secured party;

(2) Section 4-9-210, which deals with requests for an accounting and requests concerning a list of collateral and statement of account;

(3) Section 4-9-607(c), which deals with collection and enforcement of collateral;

(4) Sections 4-9-608(a) and 4-9-615(c) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;

(5) Sections 4-9-608(a) and 4-9-615(d) to the extent that they require accounting for or payment of surplus proceeds of collateral;

(6) Section 4-9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;

(7) Sections 4-9-610(b), 4-9-611, 4-9-613, and 4-9-614, which deal with disposition of collateral;

(8) Section 4-9-615(f), which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor;

(9) Section 4-9-616, which deals with explanation of the calculation of a surplus or deficiency;

(10) Sections 4-9-620, 4-9-621, and 4-9-622, which deal with acceptance of collateral in satisfaction of obligation;

(11) Section 4-9-623, which deals with redemption of collateral;

(12) Section 4-9-624, which deals with permissible waivers; and

(13) Sections 4-9-625 and 4-9-626, which deal with the secured party's liability for failure to comply with this chapter.

History. Acts 2001, No. 1439, § 1.

4-9-603. Agreement on standards concerning rights and duties.

(a) The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in § 4-9-602 if the standards are not manifestly unreasonable.

(b) Subsection (a) does not apply to the duty under § 4-9-609 to refrain from breaching the peace.

History. Acts 2001, No. 1439, § 1.

4-9-604. Procedure if security agreement covers real property or fixtures.

(a) If a security agreement covers both personal and real property, a secured party may proceed:

(1) under this part as to the personal property without prejudicing any rights with respect to the real property; or

(2) as to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply.

(b) Subject to subsection (c), if a security agreement covers goods that are or become fixtures, a secured party may proceed:

(1) under this part; or

(2) in accordance with the rights with respect to real property, in which case the other provisions of this part do not apply.

(c) Subject to the other provisions of this part, if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

(d) A secured party that removes collateral shall promptly reimburse any encumbrancer or owner of the real property, other than the debtor, for the cost of repair of any physical injury caused by the removal. The secured party need not reimburse the encumbrancer or owner for any diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of the obligation to reimburse.

History. Acts 2001, No. 1439, § 1.

CASE NOTES**Damage to Realty.**

Where plaintiff was awarded judgment for possession of mining equipment located in mine owned by unsecured party, this section did not require plaintiff to

post bond for damages which might occur during removal. *Howe Coal Co. v. Prairie Coal Co.*, 362 F. Supp. 1117 (W.D. Ark. 1973) (decision under prior law).

4-9-605. Unknown debtor or secondary obligor.

A secured party does not owe a duty based on its status as secured party:

(1) to a person that is a debtor or obligor, unless the secured party knows:

(A) that the person is a debtor or obligor;

(B) the identity of the person; and

(C) how to communicate with the person; or

(2) to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

- (A) that the person is a debtor; and
- (B) the identity of the person.

History. Acts 2001, No. 1439, § 1.

4-9-606. Time of default for agricultural lien.

For purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

History. Acts 2001, No. 1439, § 1.

4-9-607. Collection and enforcement by secured party.

(a) If so agreed, and in any event after default, a secured party:

(1) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;

(2) may take any proceeds to which the secured party is entitled under § 4-9-315;

(3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

(4) if it holds a security interest in a deposit account perfected by control under § 4-9-104(a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and

(5) if it holds a security interest in a deposit account perfected by control under § 4-9-104(a)(2) or (3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) If necessary to enable a secured party to exercise under subsection (a)(3) the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

(1) a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) the secured party's sworn affidavit in recordable form stating that:

(A) a default has occurred; and

(B) the secured party is entitled to enforce the mortgage nonjudicially.

(c) A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

(e) This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Assignment.
Costs.

Assignment.

"Assignment" language held to provide means of perfecting security interest in accounts receivable under the pre-2001 version of this chapter. *Northwest Nat'l Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 25 Ark. App. 279, 757 S.W.2d 182 (1988) (decision under prior law).

Costs.

The commercially reasonable and proper costs incurred by a secured creditor in reducing the collateral to possession and holding it and preparing it for sale were proper deductions from the proceeds of sale in arriving at the credit to be given on the debt evidenced by the note; the agreement of the accommodation maker was not required under the pre-2001 version of this chapter. *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980)

(decision under prior law).

The allowance to a secured party of the expenses of preparing for sale personalty which is held as collateral, after default, including the costs of repairs reasonably necessary, is not error; accordingly, where a secured bank purchased insurance coverage on an airplane which was held as collateral, pending the sale of the plane, the cost of the insurance was an allowable expense and was commercially reasonable as affording protection, both to the bank and to the accommodation party under the pre-2001 version of this chapter, since loss or destruction of, or damage to, the plane would have deprived the accommodation party of credit for the proceeds from the plane which he might reasonably expect. *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980) (decision under prior law).

Cited: *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987) (decision under prior law).

4-9-608. Application of proceeds of collection or enforcement — Liability for deficiency and right to surplus.

(a) If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under § 4-9-607 in the following order to:

(A) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(B) the satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed.

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under paragraph (1)(C).

(3) A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under § 4-9-607 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(4) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(b) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency.

History. Acts 2001, No. 1439, § 1.

4-9-609. Secured party's right to take possession after default.

(a) After default, a secured party:

(1) may take possession of the collateral; and

(2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under § 4-9-610.

(b) A secured party may proceed under subsection (a):

(1) pursuant to judicial process; or

(2) without judicial process, if it proceeds without breach of the peace.

(c) If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Constitutionality.
Alternative remedies.
Assignment.

Breach of the peace.
Conversion.
Notice.
Property attached to collateral.
Repossession proper.

Tender of collateral.
Writ of garnishment.

Constitutionality.

Former § 4-9-503 in authorizing a secured party to employ self-help in repossessing collateral is clear and unambiguous and does not deprive a debtor of constitutionally guaranteed rights, as long as the repossession is accomplished peacefully. *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976) (decision under prior law).

Alternative Remedies.

The self-help and replevin statutes under the pre-2001 version of this chapter are alternative methods for obtaining possession of collateral; the secured party is not required by his initial election of the judicial process to pursue that remedy to a conclusion if possession can in the meantime be otherwise obtained. *McIlroy Bank & Trust v. Seven Day Bldrs. of Ark., Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981) (decision under prior law).

Assignment.

"Assignment" language under the pre-2001 version of this chapter held to provide means of perfecting security interest in accounts receivable. *Northwest Nat'l Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 25 Ark. App. 279, 757 S.W.2d 182 (1988) (decision under prior law).

Breach of the Peace.

Issue whether repossession under the pre-2001 version of this chapter constituted a breach of the peace was properly submitted to and considered by the jury. *Rogers v. Allis-Chalmers Credit Corp.*, 679 F.2d 138 (8th Cir. 1982) (decision under prior law).

Where the truck was repossessed from the owner's driveway, there was no evidence that the reposessor entered any gates, doors, or other barricades to reach the truck, and there was no confrontation with the owner, the repossession was accomplished without breaching the peace. *Oaklawn Bank v. Baldwin*, 289 Ark. 79, 709 S.W.2d 91 (1986) (decision under prior law).

Conversion.

There was no evidence to establish conversion by creditor who repossessed vehicles. *Ford Motor Credit Co. v. Herring*, 267

Ark. 201, 589 S.W.2d 584 (1979) (decision under prior law).

Secured party who filed replevin action but then repossessed equipment by self-help under the pre-2001 version of this chapter did not convert the equipment since he was entitled to self-help under former § 4-9-503. *McIlroy Bank & Trust v. Seven Day Bldrs. of Ark., Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981) (decision under prior law).

Notice.

Where prior to repossession of automobiles by bank, the owner of a motor company had negotiated with the bank concerning the company's financial difficulties, the motor company was not entitled to notice of the bank's intention to repossess the automobiles under the pre-2001 version of this chapter. *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976) (decision under prior law).

Under the pre-2001 version of this chapter, if a buyer makes only one timely payment of the fourteen monthly payments required prior to the seller repossessing the buyer's automobile, a jury could find that the seller, by its course of dealing, waived its right to repossession based on its having repeatedly accepted late payments; in order to reinstate its right under the parties' contract, the seller would be required to give the buyer notice of the seller's requirement of strict compliance in future dealings. If the seller failed to give such notice of these circumstances, it would then not have the right to declare a default or to repossess its collateral. *Mercedes-Benz Credit Corp. v. Morgan*, 312 Ark. 225, 850 S.W.2d 297 (1993) (decision under prior law).

Where substantial evidence was presented that the buyer never received notice from the seller that it would henceforth require prompt payments under the parties' contract, a jury could have readily determined that the seller wrongfully repossessed the buyer's vehicle. *Mercedes-Benz Credit Corp. v. Morgan*, 312 Ark. 225, 850 S.W.2d 297 (1993) (decision under prior law).

Property Attached to Collateral.

Although the contract specifically provided that "any personalty in or attached to the property when repossessed may be

held by the seller without liability,” under the pre-2001 version of this chapter various pieces of concrete equipment and tools jointly owned and stored in the trucks at the time of the repossession could be held by the finance company only as long as it was necessary to secure possession of the trucks. *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979) (decision under prior law).

Where there was no evidence that the retention of the personal property, following a demand for its return, was necessary to the repossession of the trucks, under the pre-2001 version of this chapter the reposessor was not absolutely shielded from liability by the contract terms when it could reasonably be inferred that the reposessor intentionally withheld the property after a demand had been made for it. *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979) (decision under prior law).

Repossession Proper.

Where financing and security agreement between bank and owner of motor company authorized bank to remove the collateral following default and where the automobiles were repossessed by bank employees with the owner's assistance, the repossession was in conformity with this section. *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976) (decision under prior law).

Where the seller of a dump truck had assigned the conditional sales contract to a bank and had guaranteed payment to the bank in the event of the buyer's default, under the pre-2001 version of this chapter the seller was a secured creditor of the buyer and had a right to repossess the truck upon the buyer's default, even though the seller had not paid off the bank or any part of the balance due on the note at the time of the repossession. *Tucker v. Scarbrough*, 268 Ark. 736, 596 S.W.2d 4 (Ct. App. 1980) (decision under prior law).

In an action by a former wife to recover damages for conversion arising out of an alleged wrongful repossession of an automobile, the taking of the automobile was a legal repossession under the pre-2001 version of this chapter since the wife did not raise an objection to the taking and the repossession was accomplished without any incident which might have tended to provoke violence. *Williams v. Ford Motor Credit Co.*, 674 F.2d 717 (8th Cir. 1982) (decision under prior law).

Tender of Collateral.

In replevin action for recovery of secured property under the pre-2001 version of this chapter, secured creditor was estopped from relying on its right to dispose of the property on debtor's premises as justification for refusing to accept tender of equipment and fixtures, where secured creditor did not raise the issue until after the equipment had been dismantled and removed from the premises. *Affiliated Food Stores, Inc. v. Bank of N.E. Ark.*, 259 Ark. 690, 536 S.W.2d 693 (1976) (decision under prior law).

Writ of Garnishment.

Writ of garnishment was not required for bank to take possession of collateral covered by a security agreement under the pre-2001 version of this chapter. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 971 S.W.2d 788 (1998) (decision under prior law).

Cited: *Commercial Credit Corp. v. Associates Dist. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969); *Rex Fin. Corp. v. Marshall*, 406 F. Supp. 567 (W.D. Ark. 1976); *Hubbard v. Moore*, 537 F. Supp. 126 (W.D. Ark. 1982); *Ozark Kenworth, Inc. v. Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984); *Bank of Yellville v. Scott*, 113 Bankr. 516 (Bankr. W.D. Ark. 1990) (decisions under prior law).

4-9-610. Disposition of collateral after default.

(a) After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of

collateral by public or private proceedings, by one (1) or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) A secured party may purchase collateral:

(1) at a public disposition; or

(2) at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) A secured party may disclaim or modify warranties under subsection (d):

(1) in a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) by communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) A record is sufficient to disclaim warranties under subsection (e) if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

In general.
Attachment sales.
Attorney's fees.
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—In general.
—Burden of proof.
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Secured parties.
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In General.

The doctrine of commercial reasonableness applies to possession as well as disposition. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

Attachment Sales.

Rights under this section, of seller of tractor who perfected security interest for the unpaid purchase price, were not destroyed by attachment sale of the tractor effected by bank to satisfy judgment on unsecured debt owed bank by buyer of tractor, since this section relates only to the discharge of subordinate liens when property is sold under this subtitle. *Citizens Bank v. Perrin & Sons*, 253 Ark. 639, 488 S.W.2d 14 (1972) (decision under prior law).

Attorney's Fees.

A secured creditor is entitled to allowance of attorney fees as provided in an installment sales contract after the debtor has filed a bankruptcy petition. *Worthen Bank & Trust Co. v. Morris*, 602 F.2d 826 (8th Cir. 1979) (decision under prior law).

A secured creditor is entitled to recover reasonable attorney's fees for services rendered by an attorney in obtaining possession of collateral as a cost of reducing it to

possession under the pre-2001 version of this chapter where the attorney's fees allowed to a secured creditor were not those of collecting the debt, or of conducting the sale of the collateral, the provision of subdivision (1)(a) of this section requiring the agreement of the debtor had no application. *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980) (decision under prior law).

Former § 4-9-504 allowing, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by a secured party in obtaining collateral subsequent to default by a purchaser, is limited by the requirement of § 4-56-101 that the underlying instrument be a promissory note. In cases not involving promissory notes, a secured party may not collect attorney's fees incurred for services rendered by an attorney in obtaining possession of collateral after default by the purchaser, even though the parties may have contracted for such fees. *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987) (decision under prior law).

Care of Collateral.

The actions of the creditor bank with regard to the disposition of the collateral was shown to be recklessly, if not willfully, catastrophic under the pre-2001 version of this chapter; the bank destroyed valuable portions of the property, ignored advice on preserving the collateral, and destroyed equipment by attempting to dismantle it without any knowledge or care with regard to that equipment. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

Commercially Reasonable Sale.

Proof that a better price could have been obtained by a sale at a different time and in a different method was insufficient to establish commercial unreasonableness under the pre-2001 version of this chapter. *Goodin v. Farmers Tractor & Equip. Co.*, 249 Ark. 30, 458 S.W.2d 419 (1970); *Jones v. Union Motor Co.*, 29 Ark. App. 166, 779 S.W.2d 537 (1989) (decision under prior law).

Notes were extinguished by their acquisition by the maker where pledgor of notes was in default at the time the maker indirectly acquired them from the pledgees and the pledgor was given proper

notice of the sale and the sales were conducted in a commercially permissible and reasonable manner. *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (E.D. Ark. 1972) (decision under prior law).

When a debtor proceeds against a secured party, challenging the commercial reasonableness of a default sale, the debtor has the burden of proving the secured party's failure to proceed under the pre-2001 version of this chapter. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

Whether a sale was conducted in a commercially reasonable manner under the pre-2001 version of this chapter is a fact question to be determined from the facts of the particular case under consideration. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984); *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986); *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987); *Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993) (decision under prior law).

Even if it could be said that the sales of limited partnership units were not commercially reasonable under the pre-2001 version of this chapter, debtor, after default, either waived the requirements of a commercially reasonable sale, or agreed that the sales proposed by each of the banks and the manner of making them were commercially reasonable, where neither the debtor nor his attorneys, all experts, suggested any procedure other than that proposed by each of the banks, and no action was taken by either debtor or his attorneys in his behalf to question either of the sales until some months after the sale. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

Debtor failed to establish that the sales were not held in a commercially reasonable manner under the pre-2001 version of this chapter. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984); *Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993) (decision under prior law).

When the debtor defends upon the ground that the secured creditor did not proceed in accordance with the provisions of the Uniform Commercial Code in disposing of repossessed collateral under the pre-2001 version of this chapter, the creditor has the burden of proving that he proceeded in a commercially reasonable manner; whether a sale of collateral was conducted in a commercially reasonable manner is essentially a factual question. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983) (decision under prior law).

Where the uncontroverted testimony was that upon repossession the automobile dealer immediately began trying to sell the automobile to wholesalers and individual purchasers, and that the dealer apparently did everything it could to sell the vehicle as quickly as possible, including making extensive repairs on the badly damaged automobile, the delay in reselling the car was commercially reasonable under the pre-2001 version of this chapter. *Brown v. Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983) (decision under prior law).

The purchase of the repossessed mobile home by the secured party at its own private sale was improper, and the sale failed to meet the standard of commercial reasonableness in former § 4-9-504(3), where, although the secured party notified the debtors that a public sale of the repossessed property would be held, the sale was held at the secured party's offices, with only the secured party's employees present. *Benton v. General Mobile Homes, Inc.*, 13 Ark. App. 8, 678 S.W.2d 774 (1984) (decision under prior law).

A creditor who repossesses chattels and resells them in a manner inconsistent with the provisions of the Uniform Commercial Code bears the responsibility to prove that the sale was commercially reasonable under the pre-2001 version of this chapter before he is entitled to a deficiency judgment. *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986) (decision under prior law).

If a secured creditor sells collateral in a commercially unreasonable manner under the pre-2001 version of this chapter, a presumption arises that the value of the collateral is equal to the outstanding debt; the burden then shifts to the creditor to prove that the reasonable value of the

collateral was less than the debt. *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986) (decision under prior law).

The creditor did not proceed in a commercially reasonable manner under the pre-2001 version of this chapter where it retained the equipment for 19 months, sold it for \$9,500 when two years before it had a value of \$35,000, neglected to repair the excavator although repairs would have increased the sale price, and, most significantly, permitted its agent to use the equipment extensively, thus diminishing its value. *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986) (decision under prior law).

Seller acted in a commercially reasonable manner under the pre-2001 version of this chapter. *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987) (decision under prior law).

Sale was not conducted in a commercially reasonable manner under the pre-2001 version of this chapter. *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987); *Holiman v. Hagan's Motors, Inc.*, 32 Ark. App. 62, 796 S.W.2d 356 (1990) (decision under prior law).

The burden is on the secured party, as the plaintiff to establish the deficiency, and if the secured party's handling of the disposition of the collateral is attacked, it has the burden of proving that every aspect of that disposition was commercially reasonable under the pre-2001 version of this chapter, including the value of a trade-in. *Holiman v. Hagan's Motors, Inc.*, 32 Ark. App. 62, 796 S.W.2d 356 (1990) (decision under prior law).

Where creditor sent written notice that a sale of the collateral would take place at the offices of the creditor, but the sale actually took place at a dealer's-only auction at a later date, the sale was not commercially reasonable under the pre-2001 version of this chapter. *AM Credit Corp. v. Riley*, 35 Ark. App. 168, 815 S.W.2d 392 (1991) (decision under prior law).

—In General.

Commercial reasonableness under the pre-2001 version of this chapter is a flexible concept, based upon a consideration of all relevant factors presented in each individual case; factors regarding disposition include the specific nature of the

collateral, the nature of the special market, the length of time which elapsed between repossession and resale, and normal commercial practices in the trade. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

A sale of collateral was not conducted in a commercially reasonable manner under the pre-2001 version of this chapter where (1) the price obtained for the collateral was inadequate, (2) an assistant vice-president for the defendant bank testified at trial that the collateral was worth \$ 22,500 but stated in an earlier affidavit that the collateral had sufficient value to cover a \$ 40,000 debt, and (3) the disposition of the collateral was actually a settlement of a lawsuit between the defendant bank and the purchaser of the collateral, rather than an actual sale. *Eagle Bank & Trust Co. v. Dixon*, 70 Ark. App. 146, 15 S.W.3d 695 (2000) (decision under prior law).

—Burden of Proof.

Once the debtor challenges the reasonableness of the disposition, the burden is upon the secured party to prove that the disposition was commercially reasonable. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

The debtor may be required to prove a lack of commercial reasonableness when the debtor initiates an action for damages resulting from an unreasonable sale. *City Nat'l Bank v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995) (decision under prior law).

Whether a sale of collateral was conducted in a commercially reasonable manner under this section is essentially a factual question; however, summary judgment granted where plaintiff established a prima facie case that the sale was conducted in a commercially reasonable manner and that defendant failed to "meet proof with proof" in response. *Prince v. R & T Motors, Inc.*, 59 Ark. App. 16, 953 S.W.2d 62 (1997) (decision under prior law).

Where the debtor defended upon the ground that the secured creditor did not proceed to dispose of the collateral securing the indebtedness in accordance with the provisions of the UCC, the creditor then had the burden of proving that he proceeded in a commercially reasonable manner. *Mercantile Bank v. B & H Asso-*

ciated, Inc., 330 Ark. 315, 954 S.W.2d 226 (1997) (decision under prior law).

Costs of Collection.

The commercially reasonable and proper costs incurred by a secured creditor in reducing the collateral to possession and holding it and preparing it for sale were proper deductions from the proceeds of sale in arriving at the credit to be given on the debt evidenced by the note; the agreement of the accommodation maker, was not required. *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980) (decision under prior law).

The allowance to a secured party of the expenses of preparing for sale personality which is held as collateral, after default of the debtor, including the costs of repairs reasonably necessary, is not error; accordingly, where a secured bank purchased insurance coverage on an airplane which was held as collateral, pending the sale of the plane, the cost of such insurance was an allowable expense and was commercially reasonable as affording protection, both to the bank and to the accommodation party. *Svestka v. First Nat'l Bank*, 269 Ark. 237, 602 S.W.2d 604 (1980) (decision under prior law).

Recovery of any commercially reasonable cost in preparing a repossessed automobile for resale would be allowed under this section; accordingly, where the testimony given by the automobile dealer showed that there was extensive physical damage done to the vehicle, and that the carpet, tires, belts, and locks had to be replaced along with numerous other repairs and maintenance, the trial court did not err in awarding the full amount of repair and maintenance expense to the dealer. *Brown v. Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983) (decision under prior law).

The difference between what the secured party gave on resale of the automobile as a trade-in allowance and what the secured party received as a wholesale price upon the resale of the collateral automobile was an integral part of the bargain and resale of the collateral, and was an allowable expense of the resale under subdivision (1)(a) of this section. *Thrower v. Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984) (decision under prior law).

Damages.

In permitting a secured party after de-

fault to sell or lease the collateral in any commercially reasonable manner; this section does not limit a secured party's damages to the legal rate of interest. *Affiliated Food Stores, Inc. v. Bank of N.E. Ark.*, 259 Ark. 690, 536 S.W.2d 693 (1976) (decision under prior law).

Deficiency Judgements.

In action to recover deficiency judgment, prerequisite to recovery is that the secured party has the burden of proving either the actual value of the collateral at the time of its sale after repossession, or proving that reasonable notice was sent although receipt need not be proven. *Leasing Assocs. v. Slaughter & Son*, 450 F.2d 174 (8th Cir. 1971) (decision under prior law).

Where, in action against buyers of bulldozer by seller for deficiency owed after repossession and sale by seller, buyers defended action on grounds sale after repossession was not conducted properly in accord with this section and § 4-1-203, seller had the burden of proving the amount of deficiency it was entitled to recover and that the sale was made in good faith and in a commercially reasonable manner. *Farmers Equip. Co. v. Miller*, 252 Ark. 1092, 482 S.W.2d 805 (1972) (decision under prior law).

Bank which sold repossessed cars at auction was not barred from seeking a deficiency judgment against a motor company, where the motor company was in default under a financing and security agreement where the automobiles were repossessed peacefully, and where the collateral was sold pursuant to an after default agreement. *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976) (decision under prior law).

When a creditor repossesses chattels and resells them in a manner not consistent with the pre-2001 version of this chapter, it is his responsibility to prove the sale was commercially reasonable before he is entitled to a deficiency judgment. *Rhodes v. Oaklawn Bank*, 279 Ark. 51, 648 S.W.2d 470 (1983) (decision under prior law).

If a secured creditor sells the repossessed collateral in a commercially unreasonable manner, a presumption arises under the pre-2001 version of this chapter that the value of the collateral is equal to the outstanding debt; however, the se-

cured party can still recover a deficiency upon proving that the reasonable value of the collateral was less than the debt. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983) (decision under prior law).

Once the trial court properly determined the sale of a repossessed combine by a secured creditor was not commercially reasonable under the pre-2001 version of this chapter, the legal presumption arose that the combine was worth the amount of the debt; consequently, the creditor was entitled to a deficiency judgment only if he proved the reasonable value of the combine was less than such amount. Thus, where the creditor offered no evidence as to the combine's reasonable value, he was not entitled to a deficiency judgment. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983) (decision under prior law).

The creditor's right to deficiency is established by former § 4-9-504(2) and the burden is upon the secured party as the plaintiff to establish the amount to which it is entitled. When the secured party's handling of the disposition of repossessed property is attacked for want of commercial reasonableness, it then has the burden of proving it complied with the provisions of former §§ 4-9-501 — 4-9-507; when the sale is conducted according to the requirements of those sections, the amount received is evidence of the collateral's true value in such an action. *Thrower v. Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984) (decision under prior law).

Evidence supported trial court's finding under the pre-2001 version of this chapter of commercial reasonableness of a delay between default of a lease and disposition of collateral equipment. *Meachum v. Worthen Bank & Trust Co.*, 13 Ark. App. 229, 682 S.W.2d 763 (1985), cert. denied, 474 U.S. 844, 106 S. Ct. 132, 88 L. Ed. 2d 108 (1985) (decision under prior law).

The failure of the bank, as a secured party, to give proper notice to the debtor of the time and place of the sale of repossessed collateral, as required by former § 4-9-504(3), absolutely barred the bank's right to a deficiency judgment. *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987) (decision under prior law).

A secured creditor who has not complied with Commercial Code may still obtain a

deficiency judgment if he can overcome the presumption created by his violation that the collateral was worth at least the amount of the debt, thus, under the pre-2001 version of this chapter the creditor has the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law. *Cheshire v. Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990). See also *City Nat'l Bank v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995) (decision under prior law).

The failure of the secured party to give written notice under former § 4-9-504(4) or otherwise to establish the commercial reasonableness of the sale by written agreement with the debtor will bar the secured party from any right to a deficiency. *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Where a statement in writing signed by the debtors did not exist, waiver of notice requirements could be established by secured party, and the debtors were not estopped to raise failure to give adequate notice as a bar to the deficiency judgment. *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Where the sale of collateral was not commercially reasonable pursuant to the requirements of former § 4-9-504(3), the creditor's claim for a deficiency judgment was barred. *AM Credit Corp. v. Riley*, 35 Ark. App. 168, 815 S.W.2d 392 (1991) (decision under prior law).

If the secured party does not carry its burden of proof on the "commercially reasonable" issue, the secured party is prohibited under the pre-2001 version of this chapter from recovering a deficiency judgment; the secured party may, however, recover a deficiency, even though the sale was unreasonable, if it proves that the reasonable value of the collateral was less than the debt. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

Delay in disposing of the collateral, use of the collateral, or abuse of the collateral will affect the secured party's right to obtain a deficiency judgment under the pre-2001 version of this chapter. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

Prior to 1987, the Arkansas courts pre-

sumed that a creditor who failed to dispose of collateral in a commercially reasonable manner was not entitled to a deficiency judgment, but allowed the creditor to rebut this presumption with evidence that a true deficiency existed; in 1987, Arkansas adopted the "absolute bar rule," under which a creditor who failed to dispose of collateral in a commercially reasonable manner was barred from obtaining a deficiency judgment under the pre-2001 version of this chapter, and now the absolute bar rule applies generally to collateral sales in violation of the Uniform Commercial Code. *City Nat'l Bank v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995) (decision under prior law).

If the disposition of collateral is not conducted in a commercially reasonable manner under the pre-2001 version of this chapter, the creditor is entitled to a deficiency judgment. *City Nat'l Bank v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995) (decision under prior law).

After a default, a secured party has a right to repossess and dispose of its collateral, and the disposition may be made at public or private sale; if former § 4-9-504 is not complied with, the creditor is not entitled to a deficiency judgment unless the secured party proves that the reasonable value of the collateral was less than the debt. *National Bank of Commerce v. McMullan*, 196 Bankr. 818 (Bankr. W.D. Ark. 1996), cert. denied, 525 U.S. 1019, 119 S. Ct. 546, 142 L. Ed. 2d 454 (1998) (decision under prior law).

Disposition of Collateral.

Disposition of the collateral did not satisfy the requirement of former § 4-9-504(3). *First Nat'l Bank v. Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988) (decision under prior law).

This section requires that every aspect of the disposition be commercially reasonable. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

When the secured property is sold to a third party, the property has been "disposed of" pursuant to former § 4-9-504(1), and the original debtor cannot be held liable for any subsequent costs. *Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 922 S.W.2d 718 (1996) (decision under prior law).

Public Sales.

The disposition of a repossessed mobile

home is, for the purposes of the pre-2001 version of the Uniform Commercial Code, analogous to that of a car or truck, and if the secured party is to become the purchaser, a public sale is necessary to satisfy the requirements of this subtitle. *Benton v. General Mobile Homes, Inc.*, 13 Ark. App. 8, 678 S.W.2d 774 (1984) (decision under prior law).

Where seller sent notice of private sale to buyer as required by former § 4-9-504(3), placed the vehicle on a used car lot, and sold it two months subsequent to the redeemable time to a member of the general public, the sale was not a public sale; the two-month period between notice and sale was commercially reasonable under the pre-2001 version of this chapter. *Harold Gwatney Chevrolet Co. v. Cooper*, 41 Ark. App. 133, 850 S.W.2d 19 (1993) (decision under prior law).

Sale Agreements.

Notice and commercial reasonableness of sale of hens was immaterial under the pre-2001 version of this chapter where borrower who owned hens and against which lender held a security interest either agreed to or made the sale. *Pine Bluff Prod. Credit Ass'n v. Lloyd*, 252 Ark. 682, 480 S.W.2d 578 (1972) (decision under prior law).

Where debtor and bank reached a specific agreement about how the sale was to be conducted, the question of commercial reasonableness was immaterial under the pre-2001 version of this chapter. *Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

Secured Parties.

Where the seller of a dump truck had assigned the conditional sales contract to a bank and had guaranteed payment to the bank in the event of the buyer's default, the seller was a secured creditor of the buyer within the meaning of subsection (5) of this section. *Tucker v. Scarbrough*, 268 Ark. 736, 596 S.W.2d 4 (Ct. App. 1980) (decision under prior law).

Senior Secured Parties' Rights.

The plain meaning and logical implications of sections such as this section and § 4-9-504 may be preempted by a pervasive spirit of priority that supports giving a senior secured party a claim to the proceeds of a junior creditor's sale of collateral. *Stotts v. Johnson*, 302 Ark. 439,

791 S.W.2d 351 (1990) (decision under prior law).

Standard Price.

A NADA book did not make a used automobile "the subject of widely distributed standard price quotations" under the pre-2001 version of this chapter where the evidence was that the book was merely a guide to the price of a vehicle of that year, make, and model in an average condition. *Carter v. Ryburn Ford Sales, Inc.*, 248 Ark. 236, 451 S.W.2d 199 (1970), overruled on other grounds by *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987) (decision under prior law).

Value of Collateral.

It is only when the sale of repossessed collateral is conducted according to the requirements of the Uniform Commercial Code that the amount received or bid at a sale of collateral is evidence of its true value in an action to recover a deficiency under the pre-2001 version of this chapter. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983) (decision under prior law).

The fair market value under the pre-2001 version of this chapter was what a willing purchaser, under no compulsion to purchase, would have paid for the limited partnership units, recognizing what he was getting, which was, by any rational view of the evidence, a probable controversy with other investors in the organization; thus, the fair market value for such units was no more than was received for them at the sale. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), aff'd sub nom. *Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

Large discrepancy between sales price and fair market value signals a need under the pre-2001 version of this chapter for close scrutiny of sale procedures. *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987) (decision under prior law).

Under the pre-2001 version of this chapter the value of the collateral seized is presumed equal to the amount due on the debt. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

Under the pre-2001 version of this chapter the burden is on the secured party to

prove the value of the collateral at the time of repossession. *Marks v. Powell*, 162 Bankr. 820 (E.D. Ark. 1993) (decision under prior law).

Cited: *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168 (8th Cir. 1967); *Commercial Credit Corp. v. Associates Disct. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969); *Williams v. Westinghouse Credit Corp.*, 250 Ark. 1065, 468 S.W.2d 761

(1971); *Hubbard v. Moore*, 537 F. Supp. 126 (W.D. Ark. 1982); *Everett v. Parts, Inc.*, 4 Ark. App. 213, 628 S.W.2d 875 (1982); *Thomas v. International Harvester Credit Corp.*, 5 Ark. App. 244, 636 S.W.2d 296 (1982); *United States v. Dawson*, 929 F.2d 1336 (8th Cir. 1991); *Bank of Bearden v. Simpson*, 305 Ark. 326, 808 S.W.2d 341 (1991) (decisions under prior law).

4-9-611. Notification before disposition of collateral.

(a) In this section, "notification date" means the earlier of the date on which:

(1) a secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or

(2) the debtor and any secondary obligor waive the right to notification.

(b) Except as otherwise provided in subsection (d), a secured party that disposes of collateral under § 4-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition.

(c) To comply with subsection (b), the secured party shall send an authenticated notification of disposition to:

(1) the debtor;

(2) any secondary obligor; and

(3) if the collateral is other than consumer goods:

(A) any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;

(B) any other secured party or lienholder that, ten (10) days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(i) identified the collateral;

(ii) was indexed under the debtor's name as of that date; and

(iii) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

(C) any other secured party that, ten (10) days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in § 4-9-311(a).

(d) Subsection (b) does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) A secured party complies with the requirement for notification prescribed by subdivision (c)(3)(B) if:

(1) not later than twenty (20) days or earlier than thirty (30) days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements

indexed under the debtor's name in the office indicated in subdivision (c)(3)(B); and

(2) before the notification date, the secured party:

(A) did not receive a response to the request for information; or

(B) received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Attachment sales.

Notice of sale.

Attachment Sales.

Seller of tractor who perfected lien for the unpaid purchase price was not entitled, under this section, to notice of the proposed attachment sale of the tractor pursuant to judgment obtained by bank to collect unsecured debt from buyer of the tractor, since, under §§ 4-9-102(2) and 4-9-104(h), this chapter does not apply to attachment sales pursuant to a judgment. *Citizens Bank v. Perrin & Sons*, 253 Ark. 639, 488 S.W.2d 14 (1972) (decision under prior law).

Notice of Sale.

Where conditional vendor after repossessing truck gave vendee more than a week's notice of the proposed resale by certified mail and the vendee, after he received a notice from the post office that it was holding a piece of certified mail for him, did not have it picked up until about two weeks after the sale, and want of notice was not pleaded and there was no evidence in the record to indicate that notice by certified mail was not reasonable, an instruction in action for deficiency that if vendee had no knowledge of the proposed sale before it took place vendee was entitled to verdict was erroneous. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), overruled on other grounds by *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974) (decision under prior law).

Where, after repossession of an automobile, the debtor was notified that "we hereby give you seven days after receipt of this letter to pay off your contract and

redeem the automobile, or we will sell it at private sale" it was a jury question as to whether this constituted reasonable notice under this section. *Baber v. Williams Ford Co.*, 239 Ark. 1054, 396 S.W.2d 302 (1965) (decision under prior law).

An oral statement by the seller to the buyer that he was going to sell a repossessed automobile to the highest bidder, without stating the time or place, did not constitute a reasonable notice under subsection (3) of this section. *Barker v. Horn*, 245 Ark. 315, 432 S.W.2d 21 (1968), overruled on other grounds by *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987) (decision under prior law).

Reasonable notice sent to debtor from whom creditor sought to recover deficiency following sale of collateral pursuant to this section where notice of time and place of sale was mailed. *Leasing Assocs. v. Slaughter & Son*, 450 F.2d 174 (8th Cir. 1971) (decision under prior law).

Debtor's knowledge that the automobile had been repossessed did not constitute notice of sale, and conflicting testimony as to whether debtor had prior knowledge of sale and waived his right to notice presented a jury question. *Wheless v. Eudora Bank*, 256 Ark. 644, 509 S.W.2d 532 (1974) (decision under prior law).

Where defendant, who was in default under a new and used automobile financing agreement, signed a disposal of collateral agreement about nine days after repossession of automobiles by the bank, defendant waived notification of terms, times, and places of sale of the repossessed automobiles. *Teeter Motor Co. v. First Nat'l Bank*, 260 Ark. 764, 543 S.W.2d 938 (1976) (decision under prior law).

Where the evidence showed that the value of the collateral at the time of repos-

session was less than the amount due on the debt, the failure to comply with the notice requirements under the pre-2001 version of this chapter did not cause the debtor any loss and he could not recover. *Mayhew v. Loveless*, 1 Ark. App. 69, 613 S.W.2d 118 (1981) (decision under prior law).

Letter was not the written notice contemplated in former § 4-9-505, since it was not written by the secured party, it did not notify debtor that creditor intended to retain the collateral in satisfaction of the obligation, and the secured party was not in possession of the equipment; thus, the secured party was required to dispose of the collateral and account for any surplus to the debtor under former § 4-9-504, and, where it failed to do so, the debtor was entitled to recover from the secured party under former § 4-9-507 for failure to comply. *McIlroy Bank & Trust v. Seven Day Bldrs. of Ark., Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981) (decision under prior law).

Where the holder of a security interest in a repossessed airplane notified the defaulting purchasers that the airplane would be sold any time after a three-week grace period, and the airplane was then sold five months later, the security interest holder provided the debtors' sufficient notice to protect their interests, and the security interest holder had no statutory obligation under the pre-2001 version of this chapter to notify the debtors of the exact time and date of sale. *Piper Acceptance Corp. v. Yarbrough*, 702 F.2d 733 (8th Cir. 1983) (decision under prior law).

When a creditor repossesses chattels and sells them without sending the debtor notice as to the time and date of sale, or as to a date after which the collateral will be sold, he is not entitled to a deficiency judgment, unless the debtor has specifically waived his rights to such notice; accordingly, where no notice was sent and no waiver by the debtor was proven, the creditor was not entitled to a deficiency judgment under the pre-2001 version of this chapter. *Rhodes v. Oaklawn Bank*, 279 Ark. 51, 648 S.W.2d 470 (1983) (decision under prior law).

A secured party has only a duty to give reasonable notice of the time after which any private sale will be made; a second notice is not required even though a significant period of time passes before re-

sale; therefore, where a secured party gave a notice that a repossessed automobile would be sold at private sale anytime after ten days from the date of the notice, the notice was sufficient under the pre-2001 version of this chapter for a sale which occurred 16 months later. *Brown v. Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983) (decision under prior law).

Persons who were not parties or debtors to a note evidencing a bank loan to a corporation were not entitled under the pre-2001 version of this chapter to notice prior to the bank's disposition of the collateral pledged by the corporation as security for the loan. *United Fasteners, Inc. v. First State Bank*, 286 Ark. 202, 691 S.W.2d 126 (1985) (decision under prior law).

The failure to give notice requested by former § 4-9-504 does not constitute an absolute defense to an action for deficiency judgment. However, when the sale of repossessed collateral is not sold in a commercially reasonable manner, a presumption arises that the collateral is equal to the amount of the outstanding debt; consequently, the creditor is entitled under the pre-2001 version of this chapter to a deficiency judgment only if it proves the reasonable value of the collateral was less than the amount of the debt. *Mooney v. Grant County Bank*, 18 Ark. App. 224, 711 S.W.2d 841 (1986) (decision under prior law).

Where it was undisputed that notice of sale of a repossessed truck by the secured bank was not sent to the debtor but rather to her husband, who was not an obligor on the note and who had no interest in the truck, and that although the debtor did sign for receipt of the registered letter addressed to her husband, there was no evidence that she read its contents or had knowledge thereof, nor was there any evidence that she saw the notice published in the newspapers, the trial court should have found that the bank did not proceed in a commercially reasonable manner in disposing of the truck, because it failed to send notice to the debtor as required by former § 4-9-504(3). *Mooney v. Grant County Bank*, 18 Ark. App. 224, 711 S.W.2d 841 (1986) (decision under prior law).

The purpose of notice under former § 4-9-504(3) is to permit a debtor to bid in at the sale or to protect himself from an

inadequate sale price. In re Long, 83 Bankr. 579 (Bankr. E.D. Ark. 1987) (decision under prior law).

A guarantor of a note secured by a security interest in collateral is entitled under the pre-2001 version of this chapter to notice prior to sale of the collateral. In re Long, 83 Bankr. 579 (Bankr. E.D. Ark. 1987) (decision under prior law).

Although bank did not repossess the collateral and sell it, it was "otherwise disposing" of the collateral within the meaning of former § 4-9-504, and was therefore required to give notice to the debtor of the disposition. In re Long, 83 Bankr. 579 (Bankr. E.D. Ark. 1987) (decision under prior law).

Failure to give notice under former § 4-9-504 bars a secured party from asserting a deficiency judgment against a debtor. In re Long, 83 Bankr. 579 (Bankr. E.D. Ark. 1987); Bank of Dover v. Shipley, 299 Ark. 451, 773 S.W.2d 825 (1989); General Elec. Credit Auto Lease, Inc. v. Paty, 29 Ark. App. 30, 776 S.W.2d 829 (1989); Miller v. First Nat'l Bank, 29 Ark. App. 247, 780 S.W.2d 589 (1989) (decision under prior law).

Secured party who has failed to comply with requirement under the pre-2001 version of this chapter that a debtor be notified of sale of collateral may not recover deficiency established between sale price and obligation owed to creditor by debtor. Hallmark Cards, Inc. v. Peevy, 293 Ark. 594, 739 S.W.2d 691 (1987) (decision under prior law).

Where debtor is not given written notice of the time and place of the sale, the sale is not conducted according to provisions of former § 4-9-504. Womack v. First State Bank, 21 Ark. App. 33, 728 S.W.2d 194 (1987); Pollack v. Pulaski Bank & Trust Co., 30 Ark. App. 20, 781 S.W.2d 497 (1989), overruled on other grounds, Walker v. Grant County Sav. & Loan Ass'n, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Notice mailed to debtor at his home was adequate under the pre-2001 version of this chapter where it was received by his wife even though he never saw it. Clark v. First Nat'l Bank, 24 Ark. App. 52, 748 S.W.2d 42 (1988) (decision under prior law).

Failure to comply with provisions concerning notice to debtors and disposition of collateral results in a bar to recovery of

a deficiency judgment. First Nat'l Bank v. Hess, 23 Ark. App. 129, 743 S.W.2d 825 (1988) (decision under prior law).

Obligations outlined in the guaranty agreement placed guarantor in the position of a debtor for purposes of the notice requirement. First Nat'l Bank v. Hess, 23 Ark. App. 129, 743 S.W.2d 825 (1988) (decision under prior law).

When disposition is to be made by public sale, notice of the place of the sale must be given to the debtors, but no such requirement exists for disposition by private sale. Anglin v. Chrysler Credit Corp., 27 Ark. App. 173, 768 S.W.2d 44 (1989) (decision under prior law).

Former § 4-9-504(3) does not specifically require that the words "public" or "private" be used in a notice of sale. Jones v. Union Motor Co., 29 Ark. App. 166, 779 S.W.2d 537 (1989) (decision under prior law).

Where notice does not provide the debtor with the time or the place of a public sale, the notice is not in compliance with the requirements of former § 4-9-504(3), and the secured creditor is barred from obtaining a deficiency judgment against the debtor. Miller v. First Nat'l Bank, 29 Ark. App. 247, 780 S.W.2d 589 (1989) (decision under prior law).

Failure by secured creditor to send notice to guarantor does not bar the right to obtain a deficiency judgment against the debtor; however, a secured party who has failed to comply with the requirement of § 4-9-504 that a guarantor be notified of the sale of collateral may not recover a deficiency judgment against the guarantor. Miller v. First Nat'l Bank, 29 Ark. App. 247, 780 S.W.2d 589 (1989) (decision under prior law).

Former § 4-9-504(3) implies that written notice must be sent to the debtor and specifically requires a writing, signed by the debtor after default, before the debtor's right to such notice may be modified or renounced. Pollack v. Pulaski Bank & Trust Co., 30 Ark. App. 20, 781 S.W.2d 497 (1989), overruled on other grounds, Walker v. Grant County Sav. & Loan Ass'n, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Although former § 4-9-504(3) requires notice of the time and place of public sale, only reasonable notification of the time after which a private sale will be made is required. Pollack v. Pulaski Bank & Trust

Co., 30 Ark. App. 20, 781 S.W.2d 497 (1989), overruled on other grounds, *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Where notice of private sale was sent to address from which the truck was repossessed, which was where debtor's wife lived, and not to address shown on contract of sale, trial court's finding that creditor sent reasonable notice in compliance with former § 4-9-504(3) was not clearly against a preponderance of the evidence. *Cheshire v. Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990). See also *City Nat'l Bank v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995) (decision under prior law).

Handwritten message, delivered to debtor by secured party eleven days before sale, which referred to date and town of sale of collateral did not comply with notice requirements of former § 4-9-504 where there was no reference in the message to time of sale, specific location of sale, or to the method, manner, and terms of the sale other than the fact it was to be an auction. *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991) (decision under prior law).

Notices which were thorough and clearly worded, and provided, in most instances, at least two weeks notice of the date after which the collateral would be sold, were adequate under the pre-2001 version of this chapter. *City Nat'l Bank v. Unique Structures, Inc.*, 929 F.2d 1308 (8th Cir. 1991) (decision under prior law).

A secured party, who fails to notify a guarantor prior to the sale of the debtor's collateral, cannot proceed under the pre-2001 version of this chapter by in rem foreclosure of the guarantor's real estate pledged as collateral. *United States v. Dawson*, 929 F.2d 1336 (8th Cir. 1991) (decision under prior law).

Where secured party commences separate actions against the personal property collateral and the real property collateral of the guarantor, the secured party is required to act in accordance with the

notice requirements of the Arkansas Commercial Code with respect to the personal property collateral and under former § 4-9-504(3). *United States v. Dawson*, 929 F.2d 1336 (8th Cir. 1991) (decision under prior law).

Dealers-only auction, which was restricted to the participation of other dealers, was a private sale; therefore the notice received by debtor of the sale of her car, although it did not state the place of the sale, satisfied the requirements of former § 4-9-504. *Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993) (decision under prior law).

Debtors, husband and wife, failed to establish any violation of former § 4-9-504 where the debtors argued simultaneously that: (1) wife owned no property interest in the oil and gas leases and equipment; (2) wife conveyed her interest in the oil and gas properties to creditor; and (3) wife owned an interest that was not mortgaged to creditor and that creditor disposed of her interest without giving her the notice required by former § 4-9-504. *National Bank of Commerce v. McMullan*, 196 Bankr. 818 (Bankr. W.D. Ark. 1996), cert. denied, 525 U.S. 1019, 119 S. Ct. 546, 142 L. Ed. 2d 454 (1998) (decision under prior law).

The requirement set forth in former § 4-9-504(3) that the secured party give to the debtor reasonable notification of the time and place of the sale or other intended disposition of the collateral is a consideration in determining whether the sale is commercially reasonable. *First Community Bank v. Paccio*, 70 Ark. App. 313, 17 S.W.3d 510 (2000) (decision under prior law).

Where no evidence was presented as to the content of a notice of sale, the court could not say that the court erred in its conclusion that the bank failed to prove that it gave notice of the time and place of the sale to the debtors. *First Community Bank v. Paccio*, 70 Ark. App. 313, 17 S.W.3d 510 (2000) (decision under prior law).

4-9-612. Timeliness of notification before disposition of collateral.

(a) Except as otherwise provided in subsection (b), whether a notification is sent within a reasonable time is a question of fact.

(b) In a transaction other than a consumer transaction, a notification of disposition sent after default and ten (10) days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

History. Acts 2001, No. 1439, § 1.

4-9-613. Contents and form of notification before disposition of collateral: General.

Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

(A) describes the debtor and the secured party;

(B) describes the collateral that is the subject of the intended disposition;

(C) states the method of intended disposition;

(D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) states the time and place of a public disposition or the time after which any other disposition is to be made.

(2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) are nevertheless sufficient is a question of fact.

(3) The contents of a notification providing substantially the information specified in paragraph (1) are sufficient, even if the notification includes:

(A) information not specified by that paragraph; or

(B) minor errors that are not seriously misleading.

(4) A particular phrasing of the notification is not required.

(5) The following form of notification and the form appearing in § 4-9-614(3), when completed, each provides sufficient information:

NOTIFICATION OF DISPOSITION OF COLLATERAL

To: *[Name of debtor, obligor, or other person to which the notification is sent]*

From: *[Name, address, and telephone number of secured party]*

Name of Debtor(s): *[Include only if debtor(s) are not an addressee]*

[For a public disposition:]

We will sell [or lease or license, *as applicable*] the *[describe collateral]* [to the highest qualified bidder] in public as follows:

Day and Date: _____

Time: _____

Place: _____

[For a private disposition:]

We will sell [or lease or license, *as applicable*] the *[describe collateral]* privately sometime after *[day and date]*.

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, *as applicable*] [for a charge of \$_____]. You may request an accounting by calling us at [telephone number]

History. Acts 2001, No. 1439, § 1.

4-9-614. Contents and form of notification before disposition of collateral: Consumer-goods transaction.

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) the information specified in § 4-9-613(1);

(B) a description of any liability for a deficiency of the person to which the notification is sent;

(C) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under § 4-9-623 is available; and

(D) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides sufficient information:

[Name and address of secured party]

[Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]

Subject: [Identification of Transaction]

We have your [describe collateral], because you broke promises in our agreement.

[For a public disposition:]

We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date:

Time:

Place

You may attend the sale and bring bidders if you want.

[For a private disposition:]

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] [or write us at [secured party's address]] and request a written explanation. [We will charge you \$_____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at [telephone number] [or write us at [secured party's address]].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement:

[Names of all other debtors and obligors, if any]

(4) A notification in the form of paragraph (3) is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of paragraph (3) is sufficient, even if it includes errors in information not required by paragraph (1), unless the error is misleading with respect to rights arising under this chapter.

(6) If a notification under this section is not in the form of paragraph (3), law other than this chapter determines the effect of including information not required by paragraph (1).

History. Acts 2001, No. 1439, § 1.

4-9-615. Application of proceeds of disposition — Liability for deficiency and right to surplus.

(a) A secured party shall apply or pay over for application the cash proceeds of disposition under § 4-9-610 in the following order to:

(1) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(2) the satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) the secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

(B) in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) a secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subsection (a)(3).

(c) A secured party need not apply or pay over for application noncash proceeds of disposition under § 4-9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) and permitted by subsection (c):

(1) unless subsection (a)(4) requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) the obligor is liable for any deficiency.

(e) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) the debtor is not entitled to any surplus; and

(2) the obligor is not liable for any deficiency.

(f) The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and

(2) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) takes the cash proceeds free of the security interest or other lien;

(2) is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Surplus.

Where at the time of the repossession the debtor's payoff balance was less than the amount the vehicle sold for after repossession and where the trial court found that the surplus to be accounted for by the secured party was the sale price reduced by the payoff balance, further reduced by the repossession and resale expenses, the trial court was justified under the pre-2001 version of this chapter in finding that there was a surplus. *Harrell Motors, Inc. v. Sweeten*, 4 Ark. App. 230, 628 S.W.2d 878 (1982) (decision under prior law).

The requirement of former § 4-9-504 to account for any surplus includes the payment of the surplus to the debtor. *Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 922 S.W.2d 718 (1996) (decision under prior law).

The debtor's right to a surplus from the disposition of the collateral cannot be waived under the pre-2001 version of this chapter even by an express agreement. *Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 922 S.W.2d 718 (1996) (decision under prior law).

4-9-616. Explanation of calculation of surplus or deficiency.

(a) In this section:

(1) "Explanation" means a writing that:

(A) states the amount of the surplus or deficiency;

(B) provides an explanation in accordance with subsection (c) of how the secured party calculated the surplus or deficiency;

(C) states, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and

(D) provides a telephone number or mailing address from which additional information concerning the transaction is available.

(2) "Request" means a record:

(A) authenticated by a debtor or consumer obligor;

(B) requesting that the recipient provide an explanation; and

(C) sent after disposition of the collateral under § 4-9-610.

(b) In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under § 4-9-615, the secured party shall:

(1) send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

(A) before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and

(B) within fourteen (14) days after receipt of a request; or

(2) in the case of a consumer obligor who is liable for a deficiency, within fourteen (14) days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) To comply with subsection (a)(1)(B), a writing must provide the following information in the following order:

(1) the aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount

reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

(A) if the secured party takes or receives possession of the collateral after default, not more than thirty-five (35) days before the secured party takes or receives possession; or

(B) if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than thirty-five (35) days before the disposition;

(2) the amount of proceeds of the disposition;

(3) the aggregate amount of the obligations after deducting the amount of proceeds;

(4) the amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;

(5) the amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in paragraph (1); and

(6) the amount of the surplus or deficiency.

(d) A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) is sufficient, even if it includes minor errors that are not seriously misleading.

(e) A debtor or consumer obligor is entitled without charge to one (1) response to a request under this section during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subsection (b)(1). The secured party may require payment of a charge not exceeding twenty-five dollars (\$25) for each additional response.

History. Acts 2001, No. 1439, § 1.

4-9-617. Rights of transferee of collateral.

(a) A secured party's disposition of collateral after default:

(1) transfers to a transferee for value all of the debtor's rights in the collateral;

(2) discharges the security interest under which the disposition is made; and

(3) discharges any subordinate security interest or other subordinate lien.

(b) A transferee that acts in good faith takes free of the rights and interests described in subsection (a), even if the secured party fails to comply with this chapter or the requirements of any judicial proceeding.

(c) If a transferee does not take free of the rights and interests described in subsection (a), the transferee takes the collateral subject to:

- (1) the debtor's rights in the collateral;
- (2) the security interest or agricultural lien under which the disposition is made; and
- (3) any other security interest or other lien.

History. Acts 2001, No. 1439, § 1.

4-9-618. Rights and duties of certain secondary obligors.

(a) A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor:

- (1) receives an assignment of a secured obligation from the secured party;
- (2) receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party; or
- (3) is subrogated to the rights of a secured party with respect to collateral.

(b) An assignment, transfer, or subrogation described in subsection (a):

- (1) is not a disposition of collateral under § 4-9-610; and
- (2) relieves the secured party of further duties under this chapter.

History. Acts 2001, No. 1439, § 1.

4-9-619. Transfer of record or legal title.

(a) In this section, "transfer statement" means a record authenticated by a secured party stating:

- (1) that the debtor has defaulted in connection with an obligation secured by specified collateral;
- (2) that the secured party has exercised its post-default remedies with respect to the collateral;
- (3) that, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral; and
- (4) the name and mailing address of the secured party, debtor, and transferee.

(b) A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate-of-title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office shall:

- (1) accept the transfer statement;
- (2) promptly amend its records to reflect the transfer; and
- (3) if applicable, issue a new appropriate certificate of title in the name of the transferee.

(c) A transfer of the record or legal title to collateral to a secured party under subsection (b) or otherwise is not of itself a disposition of collateral under this chapter and does not of itself relieve the secured party of its duties under this chapter.

History. Acts 2001, No. 1439, § 1.

4-9-620. Acceptance of collateral in full or partial satisfaction of obligation — Compulsory disposition of collateral.

(a) Except as otherwise provided in subsection (g), a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

(1) the debtor consents to the acceptance under subsection (c);

(2) the secured party does not receive, within the time set forth in subsection (d), a notification of objection to the proposal authenticated by:

(A) a person to which the secured party was required to send a proposal under § 4-9-621; or

(B) any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;

(3) if the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance; and

(4) subsection (e) does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to § 4-9-624.

(b) A purported or apparent acceptance of collateral under this section is ineffective unless:

(1) the secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor; and

(2) the conditions of subsection (a) are met.

(c) For purposes of this section:

(1) a debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default; and

(2) a debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party:

(A) sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

(B) in the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

(C) does not receive a notification of objection authenticated by the debtor within twenty (20) days after the proposal is sent.

(d) To be effective under subsection (a)(2), a notification of objection must be received by the secured party:

(1) in the case of a person to which the proposal was sent pursuant to § 4-9-621, within twenty (20) days after notification was sent to that person; and

(2) in other cases:

(A) within twenty (20) days after the last notification was sent pursuant to § 4-9-621; or

(B) if a notification was not sent, before the debtor consents to the acceptance under subsection (c).

(e) A secured party that has taken possession of collateral shall dispose of the collateral pursuant to § 4-9-610 within the time specified in subsection (f) if:

(1) sixty percent (60%) of the cash price has been paid in the case of a purchase-money security interest in consumer goods; or

(2) sixty percent (60%) of the principal amount of the obligation secured has been paid in the case of a non-purchase-money security interest in consumer goods.

(f) To comply with subsection (e), the secured party shall dispose of the collateral:

(1) within ninety (90) days after taking possession; or

(2) within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default.

(g) In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures.

History. Acts 2001, No. 1439, § 1.

4-9-621. Notification of proposal to accept collateral.

(a) A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal to:

(1) any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral;

(2) any other secured party or lienholder that, ten (10) days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

(A) identified the collateral;

(B) was indexed under the debtor's name as of that date; and

(C) was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) any other secured party that, ten (10) days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in § 4-9-311(a).

(b) A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor in addition to the persons described in subsection (a).

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Notice.

Letter was not the written notice contemplated in this section, since it was not written by the secured party, it did not notify debtor that creditor intended to retain the collateral in satisfaction of the obligation, and the secured party was not in possession of the equipment; thus, the secured party was required to dispose of the collateral and account for any surplus to the debtor under former § 4-9-504, and, where it failed to do so, the debtor was entitled to recover from the secured party

under former § 4-9-507 for failure to comply. *McIlroy Bank & Trust v. Seven Day Bldrs. of Ark., Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981) (decision under prior law).

Cited: *Everett v. Parts, Inc.*, 4 Ark. App. 213, 628 S.W.2d 875 (1982); *Arkansas Iron & Metal Co. v. First Nat'l Bank*, 16 Ark. App. 245, 701 S.W.2d 380 (1985); *Pollack v. Pulaski Bank & Trust Co.*, 30 Ark. App. 20, 781 S.W.2d 497 (1989); *Smith v. Paul*, 317 Ark. 182, 876 S.W.2d 266 (1994) (decisions under prior law).

4-9-622. Effect of acceptance of collateral.

(a) A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

- (1) discharges the obligation to the extent consented to by the debtor;
- (2) transfers to the secured party all of a debtor's rights in the collateral;
- (3) discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and
- (4) terminates any other subordinate interest.

(b) A subordinate interest is discharged or terminated under subsection (a), even if the secured party fails to comply with this chapter.

History. Acts 2001, No. 1439, § 1.

4-9-623. Right to redeem collateral.

(a) A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

- (b) To redeem collateral, a person shall tender:
- (1) fulfillment of all obligations secured by the collateral; and
 - (2) the reasonable expenses and attorney's fees described in § 4-9-615(a)(1).
- (c) A redemption may occur at any time before a secured party:
- (1) has collected collateral under § 4-9-607;
 - (2) has disposed of collateral or entered into a contract for its disposition under § 4-9-610; or
 - (3) has accepted collateral in full or partial satisfaction of the obligation it secures under § 4-9-622.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Insufficient Tender.

Purchaser's tender of payment was insufficient to fulfill all OF the obligations secured by the collateral. *White v. Associates Com. Corp.*, 20 Ark. App. 140, 725 S.W.2d 7 (1987) (decision under prior law).

Cited: *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168 (8th Cir. 1967); *Walker v. Grant County Sav. & Loan Ass'n*, 304 Ark. 571, 803 S.W.2d 913 (1991) (decisions under prior law).

4-9-624. Waiver.

(a) A debtor or secondary obligor may waive the right to notification of disposition of collateral under § 4-9-611 only by an agreement to that effect entered into and authenticated after default.

(b) A debtor may waive the right to require disposition of collateral under § 4-9-620(e) only by an agreement to that effect entered into and authenticated after default.

(c) Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under § 4-9-623 only by an agreement to that effect entered into and authenticated after default.

History. Acts 2001, No. 1439, § 1.

SUBPART 2

NONCOMPLIANCE WITH CHAPTER

SECTION.

4-9-625. Remedies for secured party's failure to comply with chapter.

4-9-626. Action in which deficiency or surplus is in issue.

4-9-627. Determination of whether con-

SECTION.

duct was commercially reasonable.

4-9-628. Nonliability and limitation on liability of secured party — Liability of secondary obligor.

4-9-625. Remedies for secured party's failure to comply with chapter.

(a) If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this chapter. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Except as otherwise provided in § 4-9-628:

(1) a person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) for its loss; and

(2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the obligation or the time-price differential plus ten percent (10%) of the cash price.

(d) A debtor whose deficiency is eliminated under § 4-9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under § 4-9-626 may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) In addition to any damages recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover five hundred dollars (\$500) in each case from a person that:

(1) fails to comply with § 4-9-208;

(2) fails to comply with § 4-9-209;

(3) files a record that the person is not entitled to file under § 4-9-509(a);

(4) fails to cause the secured party of record to file or send a termination statement as required by § 4-9-513(a) or (c);

(5) fails to comply with § 4-9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or

(6) fails to comply with § 4-9-616(b)(2).

(f) A debtor or consumer obligor may recover damages under subsection (b) and, in addition, five hundred dollars (\$500) in each case from a person that, without reasonable cause, fails to comply with a request under § 4-9-210. A recipient of a request under § 4-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under § 4-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

Damages.

Where debtor was behind in payments on tractor-trailer and creditor simply obtained peaceful possession of the rig and,

without any attempt to comply with the notice provisions of former § 4-9-504, swapped the tractor for another tractor and the trailer for another trailer, the

debtor had the right to recover any loss caused by failure to comply, under former § 4-9-507; however, where the evidence showed that the value of the collateral at the time of repossession was less than the amount due on the debt, the failure to comply with the notice requirements did not cause the debtor any loss and he could not recover. *Mayhew v. Loveless*, 1 Ark. App. 69, 613 S.W.2d 118 (1981) (decision under prior law).

Letter was not the written notice contemplated in former § 4-9-505, since it was not written by the secured party, it did not notify debtor that creditor intended to retain the collateral in satisfaction of the obligation, and the secured party was not in possession of the equipment; thus, the secured party was required to dispose of the collateral and account for any surplus to the debtor under former § 4-9-504, and, where it failed to do so, the debtor was entitled to recover from the secured party under former § 4-9-507 for failure to comply. *McIlroy Bank & Trust v. Seven Day Bldrs. of Ark., Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981) (decision under prior law).

When the sale is conducted in a manner not in accordance with the U.C.C., the secured party does so at his own risk; however the secured party would be entitled to keep the proceeds received as a result of the sale even though they were inadequate; but, the debtor would not owe the difference between the price received and the commercially reasonable value of the property. *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982) (decision under prior law).

Former § 4-9-507 is not applicable to the creditor's action to recover a deficiency judgment, but is a separate affirmative action by the debtor to recover damages. The creditor's right to a deficiency judgment is not merely subject to whether the debtor has a right to damages under former § 4-9-507, but instead depends on whether he has complied with the statutory requirements under the pre-2001 version of this chapter concerning disposition and notice. *First State Bank v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987) (decision under prior law).

4-9-626. Action in which deficiency or surplus is in issue.

(a) In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this part.

(3) Except as otherwise provided in § 4-9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:

(A) the proceeds of the collection, enforcement, disposition, or acceptance; or

(B) the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(4) For purposes of paragraph (3)(B), the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum.

(5) If a deficiency or surplus is calculated under § 4-9-615(f), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(b) The limitation of the rules in subsection (a) to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

History. Acts 2001, No. 1439, § 1.

4-9-627. Determination of whether conduct was commercially reasonable.

(a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(b) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

- (1) in the usual manner on any recognized market;
- (2) at the price current in any recognized market at the time of the disposition; or

(3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:

- (1) in a judicial proceeding;
- (2) by a bona fide creditors' committee;
- (3) by a representative of creditors; or
- (4) by an assignee for the benefit of creditors.

(d) Approval under subsection (c) need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

History. Acts 2001, No. 1439, § 1.

CASE NOTES

ANALYSIS

Commercially reasonable sales.

Method of sale.

Value of collateral.

Commercially Reasonable Sales.

Where tractor was allegedly in poor condition when repossessed and seller which repossessed gave notice of proposed sale of tractor by six newspaper publications, mere proof that a better price could have been obtained by a sale at a different time and in a different method was insufficient to establish commercial unreasonableness under the pre-2001 version of this chapter. *Goodin v. Farmers Tractor & Equip. Co.*, 249 Ark. 30, 458 S.W.2d 419 (1970) (decision under prior law).

The trial court erred in finding that the resale of the equipment was commercially reasonable under the pre-2001 version of this chapter, in view of the fact that the debtor was prevented from presenting evidence of commercial reasonableness of the equipment at the time of the sale, and the fact that the secured party did not give notice of the sale of the repossessed items of property. *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982) (decision under prior law).

Where the holder of a security interest in a repossessed airplane sold the airplane wholesale to a dealer through a trade publication in accordance with the industry practice for aircraft finance companies, the sale method was commercially reasonable under the pre-2001 version of this chapter even though the reposessor never advertised or offered the plane for sale to retail buyers. *Piper Acceptance Corp. v. Yarbrough*, 702 F.2d 733 (8th Cir. 1983) (decision under prior law).

Whether a sale was conducted in a commercially reasonable manner under the pre-2001 version of this chapter is a fact question to be determined from the facts of the particular case under consideration. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

When a debtor proceeds against a secured party challenging the commercial reasonableness of a default sale under the pre-2001 version of this chapter, the

debtor has the burden of proving the secured party's failure to proceed pursuant to the pre-2001 version of this chapter. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

Debtor failed to establish that the sales were not held in a commercially reasonable manner under the pre-2001 version of this chapter. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

Even if it could be said that the sales of limited partnership units were not commercially reasonable under the pre-2001 version of this chapter, debtor, after default, either waived the requirements of a commercially reasonable sale, or agreed that the sales proposed by each of the banks and the manner of making them were commercially reasonable, where neither the debtor or his attorneys, all experts, suggested any procedure other than that proposed by each of the banks, and no action was taken by either debtor or his attorneys in his behalf to question either of the sale until some months after the sale had been made. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd sub nom. Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

When the debtor defends upon the ground that the secured creditor did not proceed in accordance with the provisions of the Uniform Commercial Code in disposing of repossessed collateral, the creditor has the burden of proving that he proceeded in a commercially reasonable manner; whether a sale of collateral was conducted in a commercially reasonable manner under the pre-2001 version of this chapter is essentially a factual question. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983) (decision under prior law).

Whether the repossessed collateral is sold wholesale instead of resale is not necessarily determinative of commercial unreasonableness under the pre-2001 version of this chapter; any difference between the fair market value and the price actually received is ordinarily a material

consideration, but this fact must be examined in light of all aspects of the sale to determine commercial reasonableness. *Thrower v. Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984) (decision under prior law).

The creditor did not proceed in a commercially reasonable manner under the pre-2001 version of this chapter where it retained the equipment for 19 months, sold it for \$9,500 when two years before it had a value of \$35,000, neglected to repair the excavator although repairs would have increased the sale price, and, most significantly, permitted its agent to use the equipment extensively, thus diminishing its value. *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986) (decision under prior law).

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner under the pre-2001 version of this chapter. *Jones v. Union Motor Co.*, 29 Ark. App. 166, 779 S.W.2d 537 (1989) (decision under prior law).

Method of Sale.

There is no doubt that the secured party is not absolutely required to proceed by public sale when disposing of repossessed collateral. *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 643 S.W.2d 537 (1982) (decision under prior law).

Value of Collateral.

The fair market value was what a willing purchaser, under no compulsion to purchase, would have paid for the limited partnership units, recognizing what he was getting, which was, by any rational view of the evidence, a probable controversy with other investors in the organization; thus, the fair market value for such units was no more than was received for them at the sale. *Becknell v. Quinn*, 592 F. Supp. 102 (E.D. Ark. 1983), *aff'd* sub nom. *Becknell v. First Nat'l Bank*, 740 F.2d 609 (8th Cir. 1984) (decision under prior law).

It is only when the sale of repossessed collateral is conducted according to the requirements of the Uniform Commercial Code that the amount received or bid at a sale of collateral is evidence of its true

value in an action to recover a deficiency. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983) (decision under prior law).

If a secured creditor sells the repossessed collateral in a commercially unreasonable manner, a presumption arises that the value of the collateral is equal to the outstanding debt; however, the secured party can still recover a deficiency upon proving that the reasonable value of the collateral was less than the debt. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983); *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986) (decision under prior law).

Once the trial court properly determined the sale of a repossessed combine by a secured creditor was not commercially reasonable, the legal assumption arose that the combine was worth the amount of the debt; consequently, the creditor was entitled to a deficiency judgment only if he proved the reasonable value of the combine was less than the amount of the debt; thus, where the creditor offered no evidence as to the combine's reasonable value, he was not entitled to a deficiency judgment. *Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983) (decision under prior law).

Where the appraiser had an interest in purchasing the equipment, he was unaware that the excavator had a new motor at the time it was sold to the debtor, and he did not start or operate the machine, the chancellor was entitled to regard his opinion with a degree of skepticism; therefore, the finding of the chancellor that the creditor failed to meet its burden of proving that the value of the excavator was less than the debt of \$35,000 was not clearly against the preponderance of the evidence and a deficiency judgment was properly denied. *Farmers & Merchants Bank v. Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986) (decision under prior law).

Cited: *Farmers Equip. Co. v. Miller*, 252 Ark. 1092, 482 S.W.2d 805 (1972); *Bawcom v. Allis-Chalmers Credit Corp.*, 256 Ark. 569, 508 S.W.2d 741 (1974); *Hubbard v. Moore*, 537 F. Supp. 126 (W.D. Ark. 1982); *Everett v. Parts, Inc.*, 4 Ark. App. 213, 628 S.W.2d 875 (1982); *Brown v. Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983); *Stotts v. Johnson*, 302 Ark. 439, 791

S.W.2d 351 (1990); Prince v. R & T Motors, Inc., 59 Ark. App. 16, 953 S.W.2d 62 (1997) (decisions under prior law).

4-9-628. Nonliability and limitation on liability of secured party — Liability of secondary obligor.

(a) Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person:

(1) the secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with this chapter; and

(2) the secured party's failure to comply with this chapter does not affect the liability of the person for a deficiency.

(b) A secured party is not liable because of its status as secured party:

(1) to a person that is a debtor or obligor, unless the secured party knows:

(A) that the person is a debtor or obligor;

(B) the identity of the person; and

(C) how to communicate with the person; or

(2) to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) that the person is a debtor; and

(B) the identity of the person.

(c) A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer-goods transaction or a consumer transaction or that goods are not consumer goods, if the secured party's belief is based on its reasonable reliance on:

(1) a debtor's representation concerning the purpose for which collateral was to be used, acquired, or held; or

(2) an obligor's representation concerning the purpose for which a secured obligation was incurred.

(d) A secured party is not liable to any person under § 4-9-625(c)(2) for its failure to comply with § 4-9-616.

(e) A secured party is not liable under § 4-9-625(c)(2) more than once with respect to any one (1) secured obligation.

History. Acts 2001, No. 1439, § 1.

PART 7 — TRANSITION

SECTION.

4-9-701. Effective date.

4-9-702. Savings clause.

4-9-703. Security interest perfected before effective date.

SECTION.

4-9-704. Security interest unperfected before effective date.

4-9-705. Effectiveness of action taken before effective date.

SECTION.

4-9-706. When initial financing statement suffices to continue effectiveness of financing statement.

4-9-707. Amendment of pre-effective-date financing statement.

SECTION.

4-9-708. Persons entitled to file initial financing statement or continuation statement.

4-9-709. Priority.

A.C.R.C. Notes. References to "Acts 2001, No. 1439", "this act", and any other similar references in part 7 refer to current chapter 9 of the Uniform Commercial Code and amendments to §§ 4-1-105(2); 4-1-201(9), (32), and (37); 4-2-103(3); 4-2-210; 4-2-326; 4-2-502; 4-2-716; 4-2A-103(3); 4-2A-303; 4-2A-307; 4-2A-

309(1)(b); 4-4-210(c); 4-5-118; 4-7-503(1); 4-8-103(f); 4-8-106; 4-8-110(e); 4-8-301(a); 4-8-302; and 4-8-510 enacted by Acts 2001, No. 1439.

Publisher's Notes. For Comments regarding the Uniform Commercial Code, see Commentaries Volume A.

4-9-701. Effective date.

Acts 2001, No. 1439, takes effect on July 1, 2001.

History. Acts 2001, No. 1439, § 1.

4-9-702. Savings clause.

(a) Except as otherwise provided in this part, Acts 2001, No. 1439 applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this act takes effect on July 1, 2001.

(b) Except as otherwise provided in subsection (c) and §§ 4-9-703 — 4-9-709:

(1) transactions and liens that were not governed by former Chapter 9, were validly entered into or created before this act takes effect, and would be subject to this act if they had been entered into or created after this act takes effect, and the rights, duties, and interests flowing from those transactions and liens remain valid after this act takes effect; and

(2) the transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by this act or by the law that otherwise would apply if this act had not taken effect.

(c) This act does not affect an action, case, or proceeding commenced before this act takes effect.

History. Acts 2001, No. 1439, § 1.

4-9-703. Security interest perfected before effective date.

(a) A security interest that is enforceable immediately before Acts 2001, No. 1439, takes effect on July 1, 2001, and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this act if, when this act takes effect,

the applicable requirements for enforceability and perfection under this act are satisfied without further action.

(b) Except as otherwise provided in § 4-9-705, if, immediately before this act takes effect, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under this act are not satisfied when this act takes effect, the security interest:

(1) is a perfected security interest for one (1) year after this act takes effect;

(2) remains enforceable thereafter only if the security interest becomes enforceable under § 4-9-203 before the year expires; and

(3) remains perfected thereafter only if the applicable requirements for perfection under this act are satisfied before the year expires.

(c) Notwithstanding any provision of this act, any financing statement referencing a transmitting utility as the debtor, which was sufficient for perfection of a security interest under former chapter 9 under § 4-19-101 et seq., and which was deemed a continuous filing before the effective date of this act, shall be sufficient for perfection of a security interest and maintain such continuously perfected status after the effective date of this act.

History. Acts 2001, No. 1439, § 1.

4-9-704. Security interest unperfected before effective date.

A security interest that is enforceable immediately before this act takes effect on July 1, 2001, but which would be subordinate to the rights of a person that becomes a lien creditor at that time:

(1) remains an enforceable security interest for one (1) year after this act takes effect;

(2) remains enforceable thereafter if the security interest becomes enforceable under § 4-9-203 when this act takes effect or within one (1) year thereafter; and

(3) becomes perfected:

(A) without further action, when this act takes effect if the applicable requirements for perfection under this act are satisfied before or at that time; or

(B) when the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

History. Acts 2001, No. 1439, § 1.

4-9-705. Effectiveness of action taken before effective date.

(a) If action, other than the filing of a financing statement, is taken before this act takes effect on July 1, 2001, and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable

before this act takes effect, the action is effective to perfect a security interest that attaches under this act within one year after this act takes effect. An attached security interest becomes unperfected one (1) year after this act takes effect unless the security interest becomes a perfected security interest under this act before the expiration of that period.

(b) The filing of a financing statement before this act takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this act.

(c) This act does not render ineffective an effective financing statement that, before this act takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former § 4-9-103 [repealed]. However, except as otherwise provided in subsections (d) and (e) and § 4-9-706, the financing statement ceases to be effective at the earlier of:

(1) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) June 30, 2006.

(d) The filing of a continuation statement after this act takes effect does not continue the effectiveness of the financing statement filed before this act takes effect. However, upon the timely filing of a continuation statement after this act takes effect and in accordance with the law of the jurisdiction governing perfection as provided in part 3, the effectiveness of a financing statement filed in the same office in that jurisdiction before this act takes effect continues for the period provided by the law of that jurisdiction.

(e) Subdivision (c)(2) applies to a financing statement that, before this act takes effect, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former § 4-9-103 only to the extent that part 3 provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) A financing statement that includes a financing statement filed before this act takes effect and a continuation statement filed after this act takes effect is effective only to the extent that it satisfies the requirements of part 5 for an initial financing statement.

History. Acts 2001, No. 1439, § 1. .

4-9-706. When initial financing statement suffices to continue effectiveness of financing statement.

(a) The filing of an initial financing statement in the office specified in § 4-9-501 continues the effectiveness of a financing statement filed before this act takes effect on July 1, 2001, if:

(1) the filing of an initial financing statement in that office would be effective to perfect a security interest under this act;

(2) the pre-effective-date financing statement was filed in an office in another state or another office in this State; and

(3) the initial financing statement satisfies subsection (c).

(b) The filing of an initial financing statement under subsection (a) continues the effectiveness of the pre-effective-date financing statement:

(1) if the initial financing statement is filed before this act takes effect, for the period provided in former § 4-9-403 with respect to a financing statement; and

(2) if the initial financing statement is filed after this act takes effect, for the period provided in § 4-9-515 with respect to an initial financing statement.

(c) To be effective for purposes of subsection (a), an initial financing statement must:

(1) satisfy the requirements of part 5 for an initial financing statement;

(2) identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement; and

(3) indicate that the pre-effective-date financing statement remains effective.

History. Acts 2001, No. 1439, § 1.

4-9-707. Amendment of pre-effective-date financing statement.

(a) In this section, “pre-effective-date financing statement” means a financing statement filed before this act takes effect on July 1, 2001.

(b) After this act takes effect, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in part 3. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(c) Except as otherwise provided in subsection (d), if the law of this state governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after this act takes effect only if:

(1) the pre-effective-date financing statement and an amendment are filed in the office specified in § 4-9-501;

(2) an amendment is filed in the office specified in § 4-9-501 concur-

rently with, or after the filing in that office of, an initial financing statement that satisfies § 4-9-706(c); or

(3) an initial financing statement that provides the information as amended and satisfies § 4-9-706(c) is filed in the office specified in § 4-9-501.

(d) If the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under § 4-9-705(d) and (f) or § 4-9-706.

(e) Whether or not the law of this state governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this state may be terminated after this act takes effect by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies § 4-9-706(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in part 3 as the office in which to file a financing statement.

History. Acts 2001, No. 1439, § 1.

4-9-708. Persons entitled to file initial financing statement or continuation statement.

A person may file an initial financing statement or a continuation statement under this part if:

- (1) the secured party of record authorizes the filing; and
- (2) the filing is necessary under this part:

(A) to continue the effectiveness of a financing statement filed before this act takes effect on July 1, 2001; or

(B) to perfect or continue the perfection of a security interest.

History. Acts 2001, No. 1439, § 1.

4-9-709. Priority.

(a) This act determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before this act takes effect on July 1, 2001, former chapter 9 determines priority.

(b) For purposes of § 4-9-322(a), the priority of a security interest that becomes enforceable under § 4-9-203 of this act dates from the time this act takes effect if the security interest is perfected under this act by the filing of a financing statement before this act takes effect which would not have been effective to perfect the security interest under former chapter 9. This subsection does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement.

History. Acts 2001, No. 1439, § 1.

CHAPTER 10

EFFECTIVE DATE AND REPEALER

SECTION.

4-10-101. Effective date.

4-10-102. Specific repealer and amendments — Provision for transition.

SECTION.

4-10-103. General repealer.

4-10-104. Laws not repealed.

4-10-101. Effective date.

This subtitle shall become effective at midnight on December 31, 1961.

History. Acts 1961, No. 185, § 10-101;
A.S.A. 1947, § 85-1-101n.

4-10-102. Specific repealer and amendments — Provision for transition.

(1) The following statutes are hereby repealed:

Arkansas Statutes (1957 Repl.) Sections 68-101 to 68-507, inclusive; Section 68-804; Sections 68-901 to 68-909, inclusive; Sections 68-1101 to 68-1143, inclusive, and 68-1151 to 68-1155, inclusive; Sections 68-1201 to 68-1249, inclusive; and 68-1256 to 68-1258, inclusive; Sections 68-1401 to 68-1480, inclusive; Sections 68-1501 to 68-1504, inclusive;

Arkansas Statutes (1959 Cum. Supp.) 68-1259, being Act 265 of 1959, Section 1; Arkansas Statutes (1959 Cum. Supp.) Sections 68-1701 to 68-1719, inclusive, being Act 63 of 1959;

Arkansas Statutes (1957 Repl.) Sections 64-214 and 64-301 to 64-325, inclusive;

Arkansas Statutes (1957 Repl.) Sections 67-532, 67-533, 67-534, 67-535, 67-537, 67-538, 67-539, and 67-544 to 67-546, inclusive;

Arkansas Statutes (1956 Repl.) Sections 16-201 to 16-207, inclusive; Arkansas Statutes (1947) Sections 51-1003, 51-1004, 51-1005, 51-1006, 51-1007 to 51-1009; Arkansas Statutes (1957 Repl.) Sections 73-734 and 77-1228.

(2) All the provisions of this subtitle shall apply to the issuance, transfer, and negotiation of and other dealings with warehouse certificates under Acts 1935, No. 281 [repealed] and warehouse receipts under Acts 1935, No. 83 [repealed], but Acts 1935, No. 281 [repealed] and Acts 1935, No. 83 [repealed] are not repealed except insofar as this subtitle is applicable to such certificates and receipts.

(3) In the Arkansas Statutes, all cross-references to the Uniform Negotiable Instruments Law [repealed], the Uniform Sales Act [repealed], the Uniform Stock Transfer Act [repealed], the Uniform Warehouse Receipts Act [repealed], the Uniform Bills of Lading Act [repealed], and the Uniform Trust Receipts Act [repealed], or to any

particular section or sections thereof, shall hereafter be read as references to this subtitle and the appropriate sections hereof.

(4) Transactions validly entered into before the effective date specified in § 4-10-101 of this subtitle, and the rights, duties, and interests flowing from them, remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute or other law amended or repealed by this subtitle as though such repeal or amendment had not occurred.

History. Acts 1961, No. 185, § 10-102(1), (4), (5), and (6); A.S.A. 1947, §§ 85-1-101n, 85-1-108, 85-1-109.

Publisher's Notes. Subsections (2)

and (3) of Acts 1961, No. 185, § 10-102, amended §§ 18-40-101 and 18-40-102, respectively, and are codified in those sections.

CASE NOTES

Preexisting Interests.

Although § 4-9-313 makes marked changes in the law of fixtures, where deed of trust was entered into and recorded prior to the effective date of this subtitle,

its priority under former law was saved by this section. *Wilson v. Prudential Ins. Co. of Am.*, 239 Ark. 1071, 396 S.W.2d 300 (1965).

4-10-103. General repealer.

Except as provided in the following section, all acts and parts of acts inconsistent with this subtitle are hereby repealed.

History. Acts 1961, No. 185, § 10-103; A.S.A. 1947, § 85-1-101n.

4-10-104. Laws not repealed.

The chapter on documents of title (chapter 7 of this title) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' business in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (§ 4-1-201).

History. Acts 1961, No. 185, § 10-104; A.S.A. 1947, § 85-7-106.

CHAPTERS 11-15

[Reserved]

**SUBTITLE 2. MISCELLANEOUS COMMERCIAL LAW
PROVISIONS**

**CHAPTER 16
GENERAL PROVISIONS**

[Reserved]

**CHAPTER 17
CURRENCY**

SECTION.

4-17-101. Legal tender.
4-17-102. Notes, tickets, etc. — Creation
or circulation as currency
by individuals unlawful.

SECTION.

4-17-103. Notes, tickets, etc. — Issuance
by local subdivisions and
corporations unlawful.
4-17-104. Notes, tickets, etc. — Actions.

RESEARCH REFERENCES

Am. Jur. 53A Am. Jur. 2d, Money, § 1
et seq.

4-17-101. Legal tender.

All accounts and other computations of money in the treasury and other public offices, whether state or local, and all accounts arising from proceedings in courts of justice, shall be kept and made out in the money account of the United States, that is to say, in dollars or units, dimes or tenths, cents or hundredths, mills or thousandths: a dime being the tenth part of a dollar; a cent, the hundredth part of a dollar; and a mill, the thousandth part of a dollar.

History. Rev. Stat., ch. 100, § 1; C. & M. Dig., § 7350; Pope's Dig., § 9389; A.S.A. 1947, § 68-601.

4-17-102. Notes, tickets, etc. — Creation or circulation as currency by individuals unlawful.

(a) No person unauthorized by law shall intentionally create or put in circulation, as a circulating medium, any note, bill, bond, check, or ticket, purporting that any money or bank notes will be paid to the receiver, holder, or bearer, or that it will be received in payment of debts or to be used as a currency or medium of trade in lieu of money.

(b) If any person issues, puts into circulation, signs, countersigns, or indorses any such note, bill, bond, check, or ticket, he or she shall be indicted, and upon conviction shall be fined not less than fifty dollars

(\$50.00) nor more than three hundred dollars (\$300) and shall be imprisoned not exceeding twelve (12) months.

(c) If any person or company vends, passes, receives, or offers in payment any such note, bill, bond, check, or ticket, the offender shall forfeit the sum of fifty dollars (\$50.00), to be recovered by a civil action, with costs to the use of any person who will sue for the same before any justice of the peace of the county in which the offending party may be found.

History. Rev. Stat., ch. 119, §§ 1-3; C. & M. Dig., §§ 1011-1013; Pope's Dig., §§ 1220-1222; A.S.A. 1947, §§ 68-701 — 68-703.

Publisher's Notes. This section may be obsolete.

Amendment 80 to the Arkansas Constitution, adopted by voter referendum and effective July 1, 2001, established circuit

courts as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Constitution and specifically provided that "jurisdiction conferred on Circuit Courts established by this Amendment includes all matter previously cognizable by Circuit, Chancery, Probate and Juvenile Courts..."

CASE NOTES

ANALYSIS

Applicability.
Corporations.

Applicability.

This section does not apply to checks issued by employer to employee and pay-

able at former's store. *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S.W. 924 (1902).

Corporations.

"Persons" includes corporations. *Van Horne v. State*, 5 Ark. 349 (1844).

4-17-103. Notes, tickets, etc. — Issuance by local subdivisions and corporations unlawful.

(a) It shall not be lawful for any city, town, or corporation whatever within the State of Arkansas to issue small bills or notes, commonly denominated change tickets, or shinplasters, unless specifically authorized by law.

(b) All persons, officers of the city, town, or corporation, or others, whose names shall be affixed to any such bills, notes, change tickets, or shinplasters issued in violation of this section shall be individually responsible for the same.

(c) The holders of any such bill, note, change ticket, or shinplaster issued in violation of this section may sue for and recover in gold and silver the amount for which they purport to be payable, from the individuals whose names shall be affixed thereto, before any justice of the peace residing in the city, town, or county in which the same may have been issued.

History. Acts 1838, §§ 1-3, p. 13; C. & M. Dig., §§ 1014-1016; Pope's Dig., §§ 1223-1225; A.S.A. 1947, §§ 68-704 — 68-706.

Publisher's Notes. This section may be obsolete.

Amendment 80 to the Arkansas Constitution, adopted by voter referendum and

effective July 1, 2001, established circuit courts as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Constitution and specifically provided that

"jurisdiction conferred on Circuit Courts established by this Amendment includes all matter previously cognizable by Circuit, Chancery, Probate and Juvenile Courts..."

CASE NOTES

ANALYSIS

Constitutionality.
Authority to issue.
Forgery.
Illegal issuance.
Recovery.

Constitutionality.

Former provision of this section making the decision of the justice of the peace final was unconstitutional. *Ex parte Anthony*, 5 Ark. 358 (1844), overruled on other grounds, *Carnall v. Crawford County*, 11 Ark. 604 (1851); *Ex parte Marr*, 12 Ark. 84 (1851).

Authority to Issue.

No city in the state has authority to issue bills, bonds, or notes intended to circulate as money and a provision in a city charter empowering the city to pay bonds in payment of or as security for debts does not confer authority to issue bills, bonds, or notes to circulate as money. *Jones v. Little Rock*, 25 Ark. 301 (1868).

Forgery.

Issues of change tickets are not void or even voidable and person may be con-

victed of forging them. *Van Horne v. State*, 5 Ark. 349 (1844).

Illegal Issuance.

If a city issues its obligations in an illegal form, it may bind itself by bonds legally issued to the holder of notes in lieu thereof. *Little Rock v. National Bank*, 98 U.S. 308, 25 L. Ed. 108 (1878).

City is not liable on notes issued in violation of this section. *Lindsey v. Rottaken*, 32 Ark. 619 (1878).

The officers of any municipal corporation issuing illegal paper whose names shall be affixed thereon are individually liable thereon but no liability is imposed on the corporation. *Lindsey v. Rottaken*, 32 Ark. 619 (1878).

Recovery.

Change tickets issued in violation of law may be worthless, so that no action can be maintained on them and yet be capable of being received in evidence in suit for recovery of debt for which they were given. *Iron Mt. & H.R.R. v. Stansell*, 43 Ark. 275 (1884).

4-17-104. Notes, tickets, etc. — Actions.

(a) The holder or owner of any change ticket, bill, or small note issued for the purpose of change, or otherwise, shall have the right to sue the drawer, issuer, or endorser of the change ticket or tickets, bill or bills, or small note or notes before any justice of the peace in this state.

(b) The justice of the peace before whom any suit may be brought under the provisions of this section, in all cases where he or she is satisfied that the defendant in the suit did draw, issue, sign, or endorse the change ticket, bill, or small note sued on and that the same is not paid, forthwith shall give judgment for the plaintiff for the amount of the change ticket, bill, or note sued on and shall forthwith grant the plaintiff an execution on the judgment if the plaintiff requires the execution.

(c) Any condition specified or set forth in any change ticket, bill, or note sued on that payment will be made when the sum of five dollars (\$5.00) is presented shall not be a bar to any plaintiff obtaining a

judgment on any change ticket, bill, or small note; however, the justice of the peace shall give judgment for the amount of the change ticket, bill, or small note sued on.

History. Rev. Stat., ch. 24, §§ 1-3; C. & M. Dig., §§ 1008-1010; Pope's Dig., §§ 1217-1219; A.S.A. 1947, §§ 68-709 — 68-711.

Publisher's Notes. This section may be obsolete.

Amendment 80 to the Arkansas Constitution, adopted by voter referendum and effective July 1, 2001, established circuit courts as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Constitution and specifically provided that "jurisdiction conferred on Circuit Courts established by this Amendment includes all matter previously cognizable by Circuit, Chancery, Probate and Juvenile Courts...".

Cross References. Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

CHAPTER 18

WEIGHTS AND MEASURES

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. STANDARDS OF WEIGHTS AND MEASURES.
3. UNIFORM WEIGHTS AND MEASURES LAW.

RESEARCH REFERENCES

Am. Jur. 79 Am. Jur. 2d, Wts. & Meas., § 1 et seq.

C.J.S. 94 C.J.S., Wts. & Meas., § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 4-18-101. Goods to weigh as marked — Penalty.
- 4-18-102. False or short weights and measures — Penalty.
- 4-18-103. Fruit and commodities — Packing, selling, pledging, etc., with fraudulent intent — Penalty.
- 4-18-104. Millers to keep half-bushel measure and toll dishes.

SECTION.

- 4-18-105. Legal weight of bushel of specific commodities.
- 4-18-106. Bushel of apples — What constitutes.
- 4-18-107. "Cord" defined.
- 4-18-108. Measurement of sawlogs.
- 4-18-109. Measurement of timber.
- 4-18-110. Cisterns — Barrel capacity.

Effective Dates. Acts 1885, No. 49, § 1: effective 30 days after passage.

Acts 1887, No. 97, § 2: effective on passage.

Acts 1901, No. 184, § 3: effective 30 days after passage.

Acts 1903, No. 91, § 3: effective 60 days after passage.

Acts 1911, No. 283, § 4: declared effective on passage.

Acts 1913, No. 252, § 6: Sept. 1, 1913.

Acts 1939, No. 57, § 8: Feb. 9, 1939.

Emergency clause provided: "Whereas, many employees engaged in the State of Arkansas in the severance of timber are being discriminated against and are not being paid a fair wage commensurate with the duty and labor performed; and, Whereas, it is necessary for the health, protection and the well being of the em-

ployees in the State of Arkansas, engaged in severance of timber, that the above inequality be alleviated; Now Therefore, an emergency is declared to exist and this Act shall take effect and be in full force and effect from and after its passage and approval."

4-18-101. Goods to weigh as marked — Penalty.

(a) Every package, bag, or bundle of goods or merchandise shall contain in weight what it is branded, marked, or said to contain.

(b) Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar (\$1.00) nor more than twenty-five dollars (\$25.00) for each package, bag, or bundle sold in violation of this section.

History. Acts 1913, No. 252, § 5; C. & M. Dig., § 10486; Pope's Dig., § 14504; A.S.A. 1947, § 79-112.

4-18-102. False or short weights and measures — Penalty.

Whoever knowingly buys or sells or permits any person in his employ to buy or sell any property and make or give any false or short weights or measure, and any person owning or having charge of any scales fixed for the purpose of misweighing any article bought or sold, and any person having any such scales for the purpose of weighing any property and who knowingly reports any false or untrue weight, and any firm or corporation using in the sale of any commodity a computing scale or device indicating the weight and price of the commodity upon which scale or device the graduation or indication are false or inaccurately placed, either as to weight or price, shall be deemed guilty of a misdemeanor. Upon conviction he or she shall be fined in any sum not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100), and each sale made on any such scale or device shall constitute a separate offense.

History. Acts 1911, No. 283, § 1; C. & M. Dig., § 10489; Pope's Dig., § 14507; A.S.A. 1947, § 79-116.

4-18-103. Fruit and commodities — Packing, selling, pledging, etc., with fraudulent intent — Penalty.

(a) Any person who shall pack any fruit or other merchantable commodity with the fraudulent intent of cheating others by a misrepresentation of the contents, either as to quality or quantity, shall, on conviction, be punished by a fine not exceeding five hundred dollars

(\$500) or by imprisonment at hard labor not exceeding one (1) year, or both.

(b) Any person who shall sell, pledge, or hypothecate any such commodity, knowing the same to be packed in the fraudulent manner aforesaid, with the intent to cheat and deceive shall on conviction be punished as provided in § 4-18-102.

History. Acts 1911, No. 283, §§ 2, 3; C. §§ 14508, 14509; A.S.A. 1947, §§ 79-117, & M. Dig., §§ 10490, 10491; Pope's Dig., 79-118.

4-18-104. Millers to keep half-bushel measure and toll dishes.

(a) There shall always be kept in a public mill by the owner or occupier thereof an accurate half-bushel measure and an accurate set of toll dishes.

(b) For each breach of any of the provisions of this section by the owner or occupier of a public mill, he or she shall forfeit and pay to the party aggrieved by such breach ten dollars (\$10.00), to be recovered by a civil action, with costs, before any justice of the peace.

History. Rev. Stat., ch. 99, §§ 9, 10; C. & M. Dig., §§ 7246, 7247; A.S.A. 1947, §§ 79-107, 79-108.

Publisher's Notes. Amendment 80 to the Arkansas Constitution, adopted by voter referendum and effective July 1, 2001, established circuit courts as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Constitution and specifically provided that "jurisdiction conferred on Circuit Courts established by this

Amendment includes all matter previously cognizable by Circuit, Chancery, Probate and Juvenile Courts...".

Cross References. Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

Meaning of "this act". Acts 1939, No. 280, codified as §§ 9-27-101, 20-76-101, 20-76-201, 20-76-204, 20-76-206 [repealed], 20-76-207, 20-76-401, 20-76-403, 20-76-405 — 20-76-410, 20-76-419, 20-76-424, 20-76-428 — 20-76-433, 20-76-435.

4-18-105. Legal weight of bushel of specific commodities.

The legal weight per bushel of the following shall be:

(1) Corn, shelled	56 lbs.
(2) Corn in ear, husked	70 lbs.
(3) Corn in ear, unhusked	74 lbs.
(4) Wheat	60 lbs.
(5) Oats	32 lbs.
(6) Cottonseed	32 lbs.
(7) Cornmeal	48 lbs.
(8) Barley	48 lbs.
(9) Rye	56 lbs.
(10) Potatoes	60 lbs.
(11) Potatoes, sweet	50 lbs.
(12) Onions	57 lbs.
(13) White beans	60 lbs.
(14) Peas	60 lbs.
(15) Flax seed	56 lbs.
(16) Blue grass seed	14 lbs.

(17) Clover seed	60 lbs.
(18) Timothy seed	60 lbs.
(19) Millet seed	50 lbs.
(20) Buckwheat	52 lbs.
(21) Red top	14 lbs.
(22) Orchard grass	14 lbs.
(23) Sorghum	50 lbs.
(24) Green apples	50 lbs.
(25) Dried apples	24 lbs.
(26) Dried peaches	33 lbs.
(27) Bran	20 lbs.
(28) Salt	50 lbs.
(29) Turnips	57 lbs.
(30) Broom corn seed	48 lbs.
(31) Johnson grass	28 lbs.

History. Acts 1887, No. 97, § 1, p. 191; § 14498; Acts 1953, No. 342, § 1; A.S.A. C. & M. Dig., § 10480; Pope's Dig., 1947, §§ 79-113, 79-126.

4-18-106. Bushel of apples — What constitutes.

- (a) A box nine inches (9") deep, twelve inches (12") wide, and twenty inches (20") long shall constitute a lawful bushel measure for apples.
- (b) Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00) for each offense.

History. Acts 1903, No. 91, §§ 1, 2, p. 156; C. & M. Dig., § 10479; Pope's Dig., § 14497; A.S.A. 1947, §§ 79-114, 79-115.

4-18-107. "Cord" defined.

A cord shall be defined as containing one hundred twenty-eight (128) cubic feet, and a unit of pulpwood shall be defined as containing one hundred twenty-eight cubic feet (128 cu. ft.) and this shall be the basis for purchase of timber or payment of labor in severing where the production is handled on cordage basis.

History. Acts 1939, No. 57, § 6; A.S.A. 1947, § 79-124.

RESEARCH REFERENCES

Ark. L. Rev. The Southern Pulpcripper Uniform Pulpwood Scaling and Practices and the "Short Stick": The Mississippi Act, 38 Ark. L. Rev. 359.

4-18-108. Measurement of sawlogs.

- (a) The Doyle stick or standard of log measurement shall be and the same is declared to be the standard by which all sawlogs bought, sold,

cut, or hauled in this state shall be scaled or estimated. However, in scaling logs under this section, the average diameter inside the bark shall be taken.

(b) Any person or persons buying, selling, cutting, or hauling sawlogs within the limits of this state who shall use or attempt to use any combination stick, or any other stick or standard than that mentioned in subsection (a) of this section for the purpose of scaling or estimating the number of feet in such logs sold, bought, cut, or hauled, shall be deemed guilty of a misdemeanor. Upon conviction he or she shall be fined in any sum not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200) for each offense, to be assessed by the jury trying the case and to be collected and appropriated as other public fines.

History. Acts 1901, No. 184, §§ 1, 2, p. 338; C. & M. Dig., §§ 6994, 10481; Pope's Dig., §§ 8974, 14499; A.S.A. 1947, §§ 79-119, 79-120.

4-18-109. Measurement of timber.

(a) In all contracts for the sale of timber in which the point of measurement to determine the diameter of the log is not specifically provided for, the diameter shall be determined by the diameter of the stump measured at a point the same distance in inches above the ground as the diameter in inches of the timber called for in the contract, regardless of how many inches above the ground the log may have been severed.

(b) In determining the diameter of timber in sales provided for in subsection (a), the measurement shall be made from the inside covering of one bark to the outside covering of the other bark.

(c) Nothing in this section shall apply to cypress, tupelo gum, and cottonwood.

(d) Any violation of this section shall be termed a trespass.

History. Acts 1943, No. 262, §§ 1-3; A.S.A. 1947, §§ 79-121 — 79-123.

4-18-110. Cisterns — Barrel capacity.

Whenever in any contract for the repair or construction of any cistern in this state, the capacity of which is represented in barrels, and there is no other specification of the holding capacity of the barrels, the term "barrel" shall be taken and held, in law, as meaning and intending a holding capacity which is the exact equivalent of the cubic contents of thirty-six (36) times that of the standard gallon measure of the United States which is in use and kept as required by law in the office of the Secretary of State.

History. Acts 1885, No. 49, § 1, p. 54; C. & M. Dig., § 10478; Pope's Dig., § 14496; A.S.A. 1947, § 79-125.

SUBCHAPTER 2 — STANDARDS OF WEIGHTS AND MEASURES

SECTION.

- 4-18-201. Title.
- 4-18-202. Definitions.
- 4-18-203. Penalties.
- 4-18-204. Enforcement by Arkansas Bureau of Standards.
- 4-18-205. Injunction restraining violation.
- 4-18-206. Prosecutions valid notwithstanding other valid general or specific law.
- 4-18-207. Presumptive evidence.
- 4-18-208. Director of bureau.
- 4-18-209. Staff and equipment of bureau.
- 4-18-210. Hindering or obstructing bureau personnel — Penalty.
- 4-18-211. Impersonation of bureau personnel — Penalty.
- 4-18-212. Systems of weights and measures.
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- 4-18-214. State standards — Certification.
- 4-18-215. Office and field standards — Verification.
- 4-18-216. Rules and regulations — Correct and incorrect apparatus.
- 4-18-217. Disposition of correct and incorrect apparatus.

SECTION.

- 4-18-218. Investigations.
- 4-18-219. Testing generally.
- 4-18-220. Testing of weights and measures at state-supported institutions.
- 4-18-221. Grain elevator moisture meters.
- 4-18-222. Packages or amounts of commodities — Inspection — Disposition of nonconforming units.
- 4-18-223. Fees for tests or inspections.
- 4-18-224. Stop-use, stop-removal, and removal orders.
- 4-18-225. Sale of commodities by weight, measure, or count — Exceptions — Regulations.
- 4-18-226. Information required on packaged commodities — Variations — Exemptions.
- 4-18-227. Misleading packages or containers — Standard of fill.
- 4-18-228. Advertisement of commodity in package form.
- 4-18-229. Misrepresentation of price prohibited.
- 4-18-230. Display of price — Fractions.

Publisher's Notes. Acts 1993, Nos. 610 and 624, § 1, provided: "The Arkansas Bureau of Standards, created by Act 482 of 1963, as amended, the same being A.C.A. 4-18-201 et seq., and its functions, powers, duties, assets, properties, and appropriations are transferred by a type 2 transfer [see § 25-2-105] to the State Plant Board."

Effective Dates. Acts 1963, No. 482, § 37: July 1, 1963.

Acts 1975, No. 157, § 3: Feb. 12, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law relating to the authority of the Weights and Measures Division to reject moisture meters is not adequate to properly protect the public; that it is in the best interests of the citizens of this State that the authority of the Weights and Measures Division to reject moisture meters be clarified and broadened; that this Act is designed to

give the Division the clear authority to reject moisture meters for specified reasons and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 691, § 19: close of business, June 30, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the various boards, commissions, departments, agencies, and services transferred to the Department of Commerce under the provisions of Acts 1971, No. 38, as amended, could perform their duties more efficiently as independent agencies; that the agencies and services consolidated within the Department of Commerce under Acts 1971, No. 38, are so diverse in their purposes and duties that it is diffi-

cult for the Administrator of said Department to exert leadership in the operation of such agencies and programs; and, that the abolishment of the Department of Commerce and its central services would result in financial savings which could be best used for the support and operation of other essential services of government, and that the immediate passage of this act is necessary to provide for the repeal of the Department of Commerce and for the transition of the various departments, agencies, boards, commissions, and programs and services within said Department to an independent status, as provided herein. Therefore, an emergency is hereby declared to exist and this act, being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect as follows: Section 15 of this act shall be effective from and after March 1, 1983, and the remaining provisions of this act shall be effective on the close of business June 30, 1983 and thereafter."

Acts 1995, No. 1304, § 8: Apr. 14, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act are of critical importance to the state's ability to continue the duties, responsibilities, and functions of the Arkansas Bureau of Standards. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2001, No. 586, § 15: Mar. 7, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present state laws and regulatory authority regarding standards for engine fuels, petroleum products, and automotive lubricants are outdated; that this act adopts modern standards and

grants the Director of the State Plant Board appropriate authority to maintain up-to-date standards hereafter; and that until this act becomes effective the employees of the State Plant Board will remain hampered in performing their lawful duties. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 587, § 30: Mar. 7, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present state laws and regulatory authority regarding weights and measures are outdated; that this act adopts modern standards and grants the Director of the State Plant Board appropriate authority to maintain up-to-date standards hereafter; and that until this act becomes effective the employees of the Arkansas Bureau of Standards will remain hampered in performing their lawful duties. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

Ark. L. Rev. The Southern Pulp cutter and the "Short Stick": The Mississippi

Uniform Pulpwood Scaling and Practices Act, 38 Ark. L. Rev. 359.

4-18-201. Title.

Sections 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 may be cited as the "Weights and Measures Act of 1963".

History. Acts 1963, No. 482, § 36;
A.S.A. 1947, § 79-234.

4-18-202. Definitions.

As used in §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, unless the context otherwise requires:

(1) “Barrel”, when used in connection with fermented liquor, means a unit of thirty-one gallons (31 gals.);

(2) “Commodity in package form” shall be construed to mean commodity put up or packaged in any manner in advance of sale in units suitable for either wholesale or retail sale, exclusive, however, of an auxiliary shipping container enclosing packages that individually conform to the requirements of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230. An individual item or lot of any commodity not in package form as defined in this section but on which there is marked a selling price based on an established price per unit of weight or of measure shall be construed to be commodity in package form;

(3) “Cord”, when used in connection with wood intended for fuel purposes means the amount of wood that is contained in a space of one hundred twenty-eight cubic feet (128 cu. ft.) when the wood is ranked and well-stowed;

(4) “Director” and “deputy director” shall be construed to mean, respectively, the Director of the Arkansas Bureau of Standards and the Deputy Director of the Arkansas Bureau of Standards;

(5) “Inspector” shall be construed to mean a state inspector of weights and measures;

(6) “Intrastate commerce” shall be construed to mean any and all commerce or trade that is begun, carried on, and completed wholly within the limits of the State of Arkansas, and the phrase “introduced into intrastate commerce” shall be construed to define the time and place at which the first sale and delivery of a commodity is made within the state and delivery being made either directly to the purchaser or to a common carrier for shipment to the purchaser;

(7) “Person” shall be construed to mean both the plural and singular as the case demands and shall include individuals, partnerships, corporations, companies, societies, and associations;

(8) “Sealer” and “deputy sealer” shall be construed to mean, respectively, a sealer of weights and measures and a deputy sealer of weights and measures;

(9) “Sell” and “sale” shall be construed to mean barter and exchange;

(10) “Ton” means a unit of two thousand pounds (2,000 lbs.) avoirdupois weight;

(11) “Weight” as used in connection with any commodity means net weight. Whenever any commodity is sold on the basis of weight, the net weight of the commodity shall be employed, and all contracts concerning commodities shall be so construed; and

(12) “Weights and measures” shall be construed to mean all weights and measures of every kind, instruments and devices for weighing and

measuring, and any appliances and accessories associated with any or all such instruments and devices, except that the term shall not be construed to include meters for the measurement of electricity, natural or manufactured gas, or water when they are operated in a public utility system. Electricity, gas, and water meters are specifically excluded from the purview of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, and none of the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 shall be construed to apply to these meters or to any appliances or accessories associated therewith.

History. Acts 1963, No. 482, §§ 1, 3, 24; A.S.A. 1947, §§ 79-201, 79-203, 79-224.

4-18-203. Penalties.

(a) Any person who, by himself or by his servant or agent or as the servant or agent of another person, performs any one (1) of the acts enumerated in subdivisions (b)(1)-(9) of this section shall be guilty of a misdemeanor and, upon a first conviction, shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500) or by imprisonment for not more than three (3) months, or by both fine and imprisonment, and, upon a second or subsequent conviction, he or she shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or by imprisonment for not more than one (1) year, or by both fine and imprisonment.

(b) Any person shall be subject to the penalties prescribed in subsection (a) of this section who:

(1) Uses or has in his or her possession for the purpose of using for any commercial purpose specified in § 4-18-219, sells, offers, or exposes for sale or hire, or has in his or her possession for the purpose of selling or hiring, an incorrect weight or measure or any device or instrument used to or calculated to falsify any weight or measure;

(2) Uses or has in his or her possession for the purpose of current use for any commercial purpose specified in § 4-18-219 a weight or measure that does not bear a seal or mark such as is specified in § 4-18-217, unless the weight or measure has been exempted from testing by the provisions of § 4-18-219 or by a regulation of the Director of the Arkansas Bureau of Standards issued under the authority of § 4-18-216;

(3) Disposes of any rejected or condemned weight or measure in a manner contrary to law or regulation;

(4) Removes from any weight or measure, contrary to law or regulation, any tag, seal, or mark placed thereon by the appropriate authority;

(5) Sells or offers or exposes for sale less than the quantity he or she represents of any commodity, thing, or service;

(6) Takes more than the quantity he or she represents of any commodity, thing, or service when as a buyer he or she furnishes the

weight or measure by means of which the amount of the commodity, thing, or service is determined;

(7) Keeps for the purpose of sale, advertises, or offers or exposes for sale, or sells, any commodity, thing, or service in a condition or manner contrary to law or regulation;

(8) Uses in retail trade, except in the preparation of packages put up in advance of sale and of medical prescriptions, a weight or measure that is not so positioned that its indications may be accurately read and the weighing or measuring operation observed from some position which may reasonably be assumed by a customer; or

(9) Violates any provision of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 or of the regulations promulgated under the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 for which a specific penalty has not been prescribed.

History. Acts 1963, No. 482, § 29; A.S.A. 1947, § 79-229; Acts 1995, No. 1304, § 1.

4-18-204. Enforcement by Arkansas Bureau of Standards.

(a) The Arkansas Bureau of Standards is vested with the authority to carry out the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, including the employment of necessary personnel.

(b) The bureau, through the Director of the Arkansas Bureau of Standards, shall enforce the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230.

History. Acts 1963, No. 482, §§ 6, 8; 1967, No. 157, §§ 1, 2; A.S.A. 1947, §§ 79-206, 79-208.

Publisher's Notes. The provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 were formerly administered by the Division of Weights and Measures of the State Plant Board, which was established by Acts 1963, No. 482, transferred to the Department of Commerce pursuant to Acts 1971, No. 38, § 16 [repealed], and subsequently separated from the State Plant Board and established as the Division of Weights and Measures within the Department of Commerce.

Acts 1963, No. 482, § 33, transferred all the functions, powers, and duties of the Commissioner of Revenues under § 26-55-901 et seq. and § 15-74-404 to the Division of Weights and Measures and directed that they be discharged by the Director of Weights and Measures.

Acts 1983, No. 691, § 14, provided, in part, that the Division of Weights and Measures, and all the powers, functions, and duties performed by it, were separated from the Department of Commerce and would thereafter be known as the Arkansas Bureau of Standards.

4-18-205. Injunction restraining violation.

The Director of the Arkansas Bureau of Standards is authorized to apply to any court of competent jurisdiction for, and the court upon hearing and for cause shown may grant, a temporary or permanent injunction restraining any person from violating any provision of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230.

History. Acts 1963, No. 482, § 30;
A.S.A. 1947, § 79-230.

4-18-206. Prosecutions valid notwithstanding other valid general or specific law.

Prosecutions for a violation of any provision of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 are declared to be valid and proper notwithstanding the existence of any other valid general or specific act of this state dealing with matters that may be the same as or similar to those covered by §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230.

History. Acts 1963, No. 482, § 32;
A.S.A. 1947, § 79-232.

4-18-207. Presumptive evidence.

For the purposes of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, proof of the existence of a weight or measure or a weighing or measuring device in or about any building, enclosure, stand, or vehicle in which or from which it is shown that buying or selling is commonly carried on, in the absence of conclusive evidence to the contrary, shall be presumptive proof of the regular use of the weight or measure or weighing or measuring device for commercial purposes and of that use by the person in charge of the building, enclosure, stand, or vehicle.

History. Acts 1963, No. 482, § 31;
A.S.A. 1947, § 79-231.

4-18-208. Director of bureau.

(a) The Director of the Arkansas Bureau of Standards shall be appointed by the Governor and shall serve at the pleasure of the Governor.

(b) With respect to the enforcement of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, and any other acts dealing with weights and measures that he or she is or may be empowered to enforce, the director is vested with police powers and is authorized to arrest, with warrant, any violator of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, or any other act dealing with weights and measures and to seize for use as evidence, with warrant, incorrect or unsealed weights and measures or amounts or packages of commodity found to be used, retained, offered, or exposed for sale, or sold, in violation of law.

(c) The director may establish such divisions or offices within the bureau as he or she may deem necessary for the administration of the duties of the bureau.

(d) The director shall have custody of the state standards of weight and measure, and of the other standards and equipment provided for by §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 and shall keep accurate records of the standards and equipment.

(e) He or she shall have and keep a general supervision over weights and measures offered for sale, sold, or in use in the state.

(f) He shall annually after the end of the fiscal year, June 30, make a report to the Governor on all of the activities of his or her office.

History. Acts 1963, No. 482, §§ 8, 16; 1967, No. 157, § 2; 1983, No. 691, § 14; A.S.A. 1947, §§ 79-206.1, 79-208, 79-216.

4-18-209. Staff and equipment of bureau.

(a) There shall be a deputy director, state inspectors, and technical and clerical personnel of weights and measures sufficient to accomplish the intent of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 and who, collectively, shall compose the Arkansas Bureau of Standards.

(b) The powers and duties given to and imposed upon the Director of the Arkansas Bureau of Standards by §§ 4-18-208(b), 4-18-217 — 4-18-220, 4-18-222, 4-18-224, and 4-18-225 are given to and imposed upon the deputy director and inspectors also, when acting under the instructions and at the direction of the director.

(c)(1) A bond with sureties to be approved by the State Board of Finance and conditioned upon the faithful performance of his or her duties and the safekeeping of any standards or equipment entrusted to his or her care, shall forthwith, upon his or her appointment, be given by the deputy director in the penal sum of five thousand dollars (\$5,000) and by each inspector in the penal sum of one thousand dollars (\$1,000).

(2) The premiums on the bonds shall be paid by the state.

(d) The director shall be allowed for salaries for himself or herself, the deputy director, the inspectors, and the necessary technical and clerical employees; for necessary equipment and supplies; and for traveling and contingent expenses such sums as shall be appropriated by the General Assembly.

History. Acts 1963, No. 482, §§ 6, 7, 17; 1967, No. 157, § 1; A.S.A. 1947, §§ 79-206, 79-207, 79-217.

A.C.R.C. Notes. The operation of subsection (c) of this section was suspended by adoption of a self-insured fidelity bond

program for public officers, officials and employees, effective July 20, 1987, pursuant to § 21-2-701 et seq. The subsection may again become effective upon cessation of coverage under that program. See § 21-2-703.

4-18-210. Hindering or obstructing bureau personnel — Penalty.

Any person who hinders or obstructs in any way the Director of the Arkansas Bureau of Standards, the deputy director, any one of the inspectors, or a sealer or deputy sealer in the performance of his official duties, is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment for not more than three (3) months, or by both fine and imprisonment.

History. Acts 1963, No. 482, § 27; A.S.A. 1947, § 79-227; Acts 1995, No. 1304, § 2.

4-18-211. Impersonation of bureau personnel — Penalty.

Any person who impersonates in any way the Director of the Arkansas Bureau of Standards, the deputy director, any one of the inspectors, or a sealer or deputy sealer by the use of his seal or a counterfeit of his seal, or in any other manner, is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or by imprisonment for not more than one (1) year, or by both fine and imprisonment.

History. Acts 1963, No. 482, § 28; A.S.A. 1947, § 79-228; Acts 1995, No. 1304, § 3.

4-18-212. Systems of weights and measures.

(a) The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized, and one or the other of these systems shall be used for all commercial purposes in the State of Arkansas.

(b) The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Bureau of Standards are recognized and shall govern weighing and measuring equipment and transactions in the state.

History. Acts 1963, No. 482, § 2; A.S.A. 1947, § 79-202.

4-18-213. Construction of contracts.

Fractional parts of any unit of weight or measure shall mean like fractional parts of the value of the unit as prescribed or defined in §§ 4-18-202(1), (10), and (3), and 4-18-212, and all contracts concerning the sale of commodities and services shall be construed in accordance with this requirement.

History. Acts 1963, No. 482, § 26; A.S.A. 1947, § 79-226.

4-18-214. State standards — Certification.

(a) The weights and measures in conformity with the standards of the United States which have been supplied to the state by the federal government or otherwise obtained by the state for use as state standards shall, when they shall have been certified as being satisfactory for

use as such by the National Bureau of Standards, be the state standards of weight and measure.

(b)(1) The state standards shall be kept in a safe and suitable place in the office or laboratory of the Arkansas Bureau of Standards.

(2) They shall not be removed from the office or laboratory except for repairs or for certification, and they shall be submitted at least once in ten (10) years to the National Bureau of Standards for certification.

(3) The state standards shall be used only in verifying the office standards and for scientific purposes.

History. Acts 1963, No. 482, § 4;
A.S.A. 1947, § 79-204.

4-18-215. Office and field standards — Verification.

(a) In addition to the state standards provided for in § 4-18-214, there shall be supplied by the state at least one (1) complete set of copies of the state standards to be kept in the office or laboratory of the Arkansas Bureau of Standards, which shall be known as “office standards”, and also “field standards” and such equipment as may be found necessary to carry out the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230.

(b) The office standards and field standards shall be verified upon their initial receipt and at least once each year thereafter, the office standards by direct comparison with the state standards and the field standards by comparison with the office standards.

History. Acts 1963, No. 482, § 5;
A.S.A. 1947, § 79-205.

4-18-216. Rules and regulations — Correct and incorrect apparatus.

(a) The Arkansas Bureau of Standards shall issue from time to time reasonable regulations for the enforcement of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, which regulations shall have the force and effect of law.

(b) These regulations may include:

(1) A system of determining the qualifications for registration of, and issuing permits to, sales and service personnel who for compensation place weighing and measuring devices into commercial use in this state;

(2) Standards of net weight, measure, or count, and reasonable standards of fill for any commodity in package form;

(3) Rules governing the technical and reporting procedures to be followed and the report and record forms and marks of approval and rejection to be used by inspectors of weights and measures in the discharge of their official duties; and

(4) Exemptions from the sealing or marking requirements of § 4-18-217 with respect to weights and measures of such character or size that

sealing or marking would be inappropriate, impracticable, or damaging to the apparatus in question.

(c) These regulations shall include specifications, tolerances, and regulations for weights and measures of the character of those specified in § 4-18-219, designed to eliminate from use without prejudice to apparatus that conform as closely as practicable to the official standards those that:

(1) Are not accurate;

(2) Are of such construction that they are faulty; that is, that are not reasonably permanent in their adjustment or will not repeat their indications correctly; or

(3) Facilitate the perpetration of fraud.

(d) For the purposes of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, apparatus shall be deemed to be correct when it conforms to all applicable requirements promulgated as specified in this section; other apparatus shall be deemed to be incorrect.

History. Acts 1963, No. 482, § 9; 1967, No. 157, § 3; A.S.A. 1947, § 79-209; Acts 1999, No. 1504, § 1; 2001, No. 586, § 14; 2001, No. 587, § 29.

Publisher's Notes. Subsection (c)(2), concerning the specifications, tolerances, and regulations for commercial weighing and measuring devices, was repealed by Acts 2001, No. 586, § 14, and No. 587, § 29. The subsection was derived from Acts 1963, No. 482, § 9; 1967, No. 157, § 3; A.S.A. 1947, § 79-209; Acts 1999, No. 1504, § 1.

Amendments. The 1999 amendment, in (c)(2), substituted "National Institute of Standards and Technology" for "National Bureau of Standards," substituted "National Institute of Standards and Technology Handbook 44, Handbook 130" for "National Bureau of Standards Handbook 44," and inserted "and Handbook 130"; and made minor punctuation changes.

The 2001 amendment by Nos. 586 and 587 both repealed former (c)(2) and redesignated former (c)(1)(A)-(C) as present (c)(1)-(3).

4-18-217. Disposition of correct and incorrect apparatus.

(a)(1) The Director of the Arkansas Bureau of Standards shall approve for use, and seal or mark with appropriate devices, such weights and measures as he or she finds upon inspection and test to be correct as defined in § 4-18-216, and shall reject and mark or tag as "rejected" such weights and measures as he or she finds, upon inspection or test, to be incorrect as defined in § 4-18-216, but which in his or her best judgment are susceptible to satisfactory repair.

(2) However, the sealing or marking shall not be required with respect to such weights and measures as may be exempted by a regulation of the director issued under the authority of § 4-18-216.

(b) The director shall condemn and may seize and may destroy weights and measures found to be incorrect that, in his or her best judgment, are not susceptible to satisfactory repair.

(c) Weights and measures that have been rejected may be confiscated and may be destroyed by the director if not corrected as required by subsections (d) and (e) of this section, or if used or disposed of contrary to the requirements of subsection (f) of this section.

(d) Weights and measures that have been rejected under the authority of the director or of a sealer shall remain subject to the control of the rejecting authority until such time as suitable repair or disposition has been made as required by this section.

(e) The owners of the rejected weights and measures shall cause the weights and measures to be made correct within thirty (30) days or such longer period as may be authorized by the rejecting authority; or, in lieu of this, may dispose of them, but only in such manner as is specifically authorized by the rejecting authority.

(f) Weights and measures that have been rejected shall not again be used commercially until they have been officially reexamined and found to be correct or until specific written permission for such use is issued by the rejecting authority.

History. Acts 1963, No. 482, §§ 15, 18;
A.S.A. 1947, §§ 79-215, 79-218.

4-18-218. Investigations.

The Director of the Arkansas Bureau of Standards shall investigate complaints made to him or her concerning violations of the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 and shall, upon his or her own initiative, conduct such investigations as he or she deems appropriate and advisable to develop information on prevailing procedures in commercial quantity determination and on possible violations of the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, and to promote the general objective of accuracy in the determination and representation of quantity in commercial transactions.

History. Acts 1963, No. 482, § 12;
A.S.A. 1947, § 79-212.

4-18-219. Testing generally.

(a) When not otherwise provided by law, the Director of the Arkansas Bureau of Standards shall have the power to inspect and test to ascertain if all weights and measures kept, offered, or exposed for sale are correct.

(b) It shall be the duty of the director, within a twelve-month period, or less frequently if in accordance with a schedule issued by him or her, or more often as he or she may deem necessary, to inspect and test to ascertain if all weights and measures commercially used in determining the weight, measurement, or count of commodities or things sold or offered or exposed for sale on the basis of weight, measure, or count, or in computing the basic charge or payment for services rendered on the basis of weight, measure, or count are correct.

(c) However, with respect to single-service devices, that is, devices designed to be used commercially only once and to be then discarded, and with respect to devices uniformly mass produced, as by means of a mold or die, and not susceptible to individual adjustment, tests may be

made on representative samples of these devices; and the lots of which the samples are representative shall be held to be correct or incorrect upon the basis of the results of the inspections and tests on the samples.

History. Acts 1963, No. 482, § 11;
A.S.A. 1947, § 79-211.

4-18-220. Testing of weights and measures at state-supported institutions.

The director shall, from time to time, test all weights and measures used in checking the receipt or disbursement of supplies in every institution for the maintenance of which moneys are appropriated by the General Assembly and shall report his or her findings, in writing, to the supervisory board and to the executive officer of the institution concerned.

History. Acts 1963, No. 482, § 10;
A.S.A. 1947, § 79-210.

4-18-221. Grain elevator moisture meters.

(a) The Arkansas Bureau of Standards shall periodically, at least annually, test all moisture meters used at public grain elevators in this state where wheat, soybeans, rice, milo, or any other grain is bought and sold.

(b) Moisture testers may be rejected for any of the following reasons:

(1) The moisture testing device tested is found to be out of tolerance with the testing machine used by the inspector by more than one-half of one percent (0.5%), plus or minus (+ or -), on grain under twenty-two percent (22%) moisture content or by more than one percent (1%), plus or minus (+ or -), on grain having twenty-two percent (22%) or more moisture content;

(2) The warehouseman does not have available the latest charts for the type of machine being used;

(3) The warehouseman does not have available the proper scale or scales and the thermometers for use with the type of machine being used; or

(4) The moisture testing device is not free from excessive dirt, cracked glass, or is not kept in good operational condition at all times.

(c) It is unlawful for any person to use any moisture meter disapproved by the bureau, and any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than twenty-five dollars (\$25.00) nor more than two hundred fifty dollars (\$250).

History. Acts 1973, No. 591, §§ 1-3;
1975, No. 157, § 1; A.S.A. 1947, §§ 79-235
— 79-237.

4-18-222. Packages or amounts of commodities — Inspection — Disposition of nonconforming units.

(a)(1) The Director of the Arkansas Bureau of Standards shall, from time to time, weigh or measure and inspect packages or amounts of commodities kept, offered, or exposed for sale, sold, or in the process of delivery to determine whether the packages or amounts of commodities contain the amounts represented and whether they are kept, offered, or exposed for sale, or sold, in accordance with law.

(2) When the packages or amounts of commodities are found not to contain the amounts represented or are found to be kept, offered, or exposed for sale in violation of law, the director may order them off sale and may so mark or tag them as to show them to be illegal.

(b) In carrying out the provisions of this section, the director may employ recognized sampling procedures under which the compliance of a given lot of packages will be determined on the basis of the result obtained on a sample selected from and representative of the lot.

(c) No person shall:

(1) Sell, or keep, offer, or expose for sale, in intrastate commerce any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section unless and until the package or amount of commodity has been brought into full compliance with all legal requirements; or

(2) Dispose of any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section and that has not been brought into compliance with legal requirements in any manner except with the specific approval of the director.

History. Acts 1963, No. 482, § 13;
A.S.A. 1947, § 79-213.

4-18-223. Fees for tests or inspections.

The Arkansas Bureau of Standards shall levy no charges or fees for the tests or inspections made under §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230.

History. Acts 1963, No. 482, § 9; 1967,
No. 157, § 3; A.S.A. 1947, § 79-209.

4-18-224. Stop-use, stop-removal, and removal orders.

(a) The Director of the Arkansas Bureau of Standards shall have the power to issue stop-use orders, stop-removal orders, and removal orders with respect to weights and measures being or susceptible to being commercially used, and to issue stop-removal orders and removal orders with respect to packages or amounts of commodities kept, offered, or exposed for sale, sold, or in process of delivery, whenever in the course of his or her enforcement of the provisions of §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230 he or she deems it necessary or expedient to issue these orders.

(b) No person shall use, remove from the premises specified, or fail to remove from the premises specified any weight, measure, or package or amount of commodity contrary to the terms of a stop-use order, stop-removal order, or removal order issued under the authority of this section.

History. Acts 1963, No. 482, § 14;
A.S.A. 1947, § 79-214.

4-18-225. Sale of commodities by weight, measure, or count — Exceptions — Regulations.

(a) Commodities in liquid form shall be sold only by liquid measure or by weight, and, except as otherwise provided in §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, commodities not in liquid form shall be sold only by weight, by measure of length or area, or by count. However, liquid commodities may be sold by weight and commodities not in liquid form may be sold by count only if such methods give accurate information as to the quantity of commodity sold.

(b) The provisions of this section shall not apply to:

(1) Commodities when sold for immediate consumption on the premises where sold;

(2) Vegetables when sold by the head or bunch;

(3) Commodities in containers standardized by a law of this state or by federal law;

(4) Commodities in package form when there exists a general consumer usage to express the quantity in some other manner;

(5) Concrete aggregates, concrete mixtures, and loose solid materials such as earth, soil, gravel, crushed stone, and the like when sold by cubic measure; or

(6) Unprocessed vegetable and animal fertilizer when sold by cubic measure.

(c) The Director of the Arkansas Bureau of Standards may issue such reasonable regulations as are necessary to assure that amounts of commodity sold are determined in accordance with good commercial practice and are so determined and represented as to be accurate and informative to all parties at interest.

History. Acts 1963, No. 482, § 19;
A.S.A. 1947, § 79-219.

4-18-226. Information required on packaged commodities — Variations — Exemptions.

(a) Except as otherwise provided in §§ 4-18-201 — 4-18-220 and 4-18-222 — 4-18-230, any commodity in package form introduced or delivered for introduction into or received in intrastate commerce, kept for the purpose of sale, or offered or exposed for sale in intrastate

commerce shall bear on the outside of the package a definite, plain, and conspicuous declaration of:

(1) The identity of the commodity in the package unless the same can easily be identified through the wrapper or container;

(2) The net quantity of the contents in terms of weight, measure, or count; and

(3) In the case of any package kept, offered, or exposed for sale or sold any place other than on the premises where packed, the name and place of business of the manufacturer, packer, or distributor.

(b) However, in connection with the declaration required under subdivision (a)(2) of this section, neither the qualifying term "when packed" or any words of similar import, nor any term qualifying a unit of weight, measure, or count, for example, "jumbo", "giant", "full", and the like, that tends to exaggerate the amount of commodity in a package shall be used.

(c) Additionally, under subdivision (a)(2) of this section the director shall, by regulation, establish:

(1) Reasonable variations to be allowed, which may include variations below the declared weight or measure caused by ordinary and customary exposure, only after the commodity is introduced into intrastate commerce, to conditions that normally occur in good distribution practice and that unavoidably result in decreased weight or measure;

(2) Exemptions as to small packages; and

(3) Exemptions as to commodities put up in variable weights or sizes for sale intact and either customarily not sold as individual units or customarily weighed or measured at time of sale to the consumer.

(d) In addition to the declarations required by subsection (a) of this section, any commodity in package form, the package being one of a lot containing random weights, measures, or counts of the same commodity and bearing the total selling price of the package, shall bear on the outside of the package a plain and conspicuous declaration of the price per single unit of weight, measure, or count.

History. Acts 1963, No. 482, §§ 20, 21;
A.S.A. 1947, §§ 79-220, 79-221.

4-18-227. Misleading packages or containers — Standard of fill.

(a) No commodity in package form shall be so wrapped nor shall it be in a container so made, formed, or filled as to mislead the purchaser as to the quantity of the contents of the package.

(b) The contents of a container shall not fall below such reasonable standard of fill as may have been prescribed for the commodity in question by the Director of the Arkansas Bureau of Standards.

History. Acts 1963, No. 482, § 22;
A.S.A. 1947, § 79-222.

4-18-228. Advertisement of commodity in package form.

Whenever a commodity in package form is advertised in any manner and the retail price of the package is stated in the advertisement, there shall be closely and conspicuously associated with the statement of price a declaration of the basic quantity of contents of the package as is required by law or regulation to appear on the package. However, in connection with the declaration required under this section there shall be declared neither the qualifying term "when packed" nor any other words of similar import, nor any term qualifying a unit of weight, measure, or count, for example, "jumbo", "giant", "full", and the like, that tends to exaggerate the amount of commodity in the package.

History. Acts 1963, No. 482, § 23;
A.S.A. 1947, § 79-223.

4-18-229. Misrepresentation of price prohibited.

Whenever any commodity or service is sold or is offered, exposed, or advertised for sale by weight, measure, or count, the price shall not be misrepresented, nor shall the price be represented in any manner calculated or tending to mislead or deceive an actual or prospective purchaser.

History. Acts 1963, No. 482, § 25;
A.S.A. 1947, § 79-225.

4-18-230. Display of price — Fractions.

Whenever an advertised, posted, or labeled price per unit of weight, measure, or count includes a fraction of a cent, all elements of the fraction shall be prominently displayed and the numerals expressing the fraction shall be immediately adjacent to, of the same general design and style as, and at least one-half ($\frac{1}{2}$) the height and width of the numerals representing the whole cents.

History. Acts 1963, No. 482, § 25;
A.S.A. 1947, § 79-225.

SUBCHAPTER 3 — UNIFORM WEIGHTS AND MEASURES LAW

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- 4-18-327. Regulations to be unaffected by repeal of prior enabling statute.
- 4-18-328. Regulations.

Effective Dates. Acts 2001, No. 587, § 30: Mar. 7, 2001. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present state laws and regulatory authority regarding weights and measures are outdated; that this act adopts modern standards and grants the Director of the State Plant Board appropriate authority to maintain up-to-date standards hereafter; and that until this act becomes effective the employees of the Arkansas Bureau of Standards will remain hampered in performing their lawful duties. Therefore, an

emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

4-18-301. Definitions.

For purposes of this subchapter:

(1) "Weight(s) and measure(s)" means all weights and measures of every kind, instruments and devices for weighing and measuring, and any appliance and accessories associated with any or all such instruments and devices.

(2) "Weight" as used in connection with any commodity or service means net weight. When a commodity is sold by drained weight, the term means net drained weight.

(3) "Correct" as used in connection with weights and measures means conformance to all applicable requirements of this subchapter.

(4) "Primary standards" means the physical standards of the state that serve as the legal reference from which all other standards for weights and measures are derived.

(5) "Secondary standards" means the physical standards that are traceable to the primary standards through comparisons, using acceptable laboratory procedures, and used in the enforcement of weights and measures laws and regulations.

(6) "Director" means the Director of the State Plant Board.

(7) "Person" means both plural and the singular, as the case demands, and includes individuals, partnerships, corporations, companies, societies, and associations.

(8) "Sale from bulk" means the sale of commodities when the quantity is determined at the time of sale.

(9) "Package", except as modified by Section 1 of the Application of the Uniform Packaging and Labeling Regulation, whether standard package or random package, means any commodity:

(a) enclosed in a container or wrapped in any manner in advance of wholesale or retail sale or

(b) whose weight or measure has been determined in advance of wholesale or retail sale.

An individual item or lot of any commodity on which there is marked a selling price based on an established price per unit of weight or of measure shall be considered a package.

(10) "Net mass" or "net weight" means the weight of a commodity excluding any materials, substances, or items not considered to be part of the commodity. Materials, substances, or items not considered to be part of the commodity include, but are not limited to, containers, conveyances, bags, wrappers, packaging materials, labels, individual piece coverings, decorative accompaniments, and coupons, except that, depending on the type of service rendered, packaging materials may be considered to be part of the service.

For example, the service of shipping includes the weight of packing materials.

(11) "Random weight package" means a package that is one (1) of a lot, shipment, or delivery of packages of the same commodity with no fixed pattern of weights.

(12) "Standard package" means a package that is one (1) of a lot, shipment, or delivery of packages of the same commodity with identical net contents declarations; for example, one (1) liter bottles or twelve (12) fluid ounce cans of carbonated soda; five hundred (500) gram or five (5) pound bags of sugar; one hundred (100) meters or three-hundred foot (300') packages of rope.

(13) "Commercial weighing and measuring equipment" means weights and measures and weighing and measuring devices commercially used or employed in establishing the size, quantity, extent, area, or measurement of quantities, things, produce, or articles for distribution or consumption, purchased, offered, or submitted for sale, hire, or award, or in computing any basic charge or payment for services rendered on the basis of weight or measure.

(14) "Board" means the State Plant Board.

(15) "Commodity" means an article or raw material that can be bought and sold.

4-18-302. Systems of weights and measures.

The International System of Units (SI) and the system of weights and measures in customary use in the United States are jointly recognized, and either one (1) or both of these systems shall be used for all commercial purposes in the state. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Institute of Standards and Technology are recognized and shall govern weighing and measuring equipment and transactions in the state.

History. Acts 2001, No. 587, § 2.

4-18-303. Physical standards.

Weights and measures that are traceable to the United States prototype standards supplied by the Federal Government, or approved as being satisfactory by the National Institute of Standards and Technology, shall be the state primary standards of weights and measures, and shall be maintained in such calibration as prescribed by the National Institute of Standards and Technology. All secondary standards may be prescribed by the board and shall be verified upon their initial receipt, and as often thereafter as deemed necessary by the board.

History. Acts 2001, No. 587, § 3.

4-18-304. Technical requirements for weighing and measuring devices.

The specifications, tolerances, and other technical requirements for commercial, law enforcement, data gathering, and other weighing and measuring devices as adopted by the National Conference on Weights and Measures, published in the National Institute of Standards and Technology Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices," and supplements thereto or revisions thereof, shall apply to weighing and measuring devices in the state, as adopted, or amended and adopted, by rule of the board.

History. Acts 2001, No. 587, § 4.

4-18-305. Requirements for packaging and labeling.

The Uniform Packaging and Labeling Regulation as adopted by the National Conference on Weights and Measures and published in the National Institute of Standards and Technology Handbook 130, "Uniform Laws and Regulations," and supplements thereto or revisions thereof, shall apply to packaging and labeling in the state, as adopted, or amended and adopted, by rule of the board.

History. Acts 2001, No. 587, § 5.

4-18-306. Requirements for the method of sale of commodities.

The Uniform Regulation for the Method of Sale of Commodities as adopted by the National Conference on Weights and Measures and published in National Institute of Standards and Technology Handbook 130, "Uniform Laws and Regulations," and supplements thereto or revisions thereof, shall apply to the method of sale of commodities in the state, as adopted, or amended and adopted, by rule of the board.

History. Acts 2001, No. 587, § 6.

4-18-307. Requirements for unit pricing.

The Uniform Unit Pricing Regulation as adopted by the National Conference on Weights and Measures and published in the National Institute of Standards and Technology Handbook 130, "Uniform Laws and Regulations," and supplements thereto or revisions thereof, shall apply to unit pricing in the state, as adopted, or amended and adopted, by rule of the board.

History. Acts 2001, No. 587, § 7.

4-18-308. Requirements for the registration of servicepersons and service agencies for commercial weighing and measuring devices.

The Uniform Regulation for the Voluntary Registration of Service Persons and Service Agencies for Commercial Weighing and Measuring Devices as adopted by the National Conference on Weights and Measures and published in the National Institute of Standards and Technology Handbook 130, "Uniform Laws and Regulations," and supplements thereto or revisions thereof, shall apply to the registration of servicepersons and service agencies in the state, as adopted, or amended and adopted, by rule of the board.

History. Acts 2001, No. 587, § 8.

4-18-309. Requirements for open dating.

The Uniform Open Dating Regulation as adopted by the National Conference on Weights and Measures and published in the National Institute of Standards and Technology Handbook 130, "Uniform Laws and Regulations," and supplements thereto or revisions thereof, shall apply to open dating in the state, as adopted, or amended and adopted, by rule of the board.

History. Acts 2001, No. 587, § 9.

4-18-310. Requirements for type evaluation.

The Uniform Regulation for National Type Evaluation as adopted by the National Conference on Weights and Measures and published in National Institute of Standards and Technology Handbook 130, "Uniform Laws and Regulations," and supplements thereto or revisions thereof, shall apply to type evaluation in the state, as adopted, or amended and adopted, by rule of the board.

History. Acts 2001, No. 587, § 10.

4-18-311. State Weights and Measures Division.

There is hereby created a State Division of Weights and Measures located for administrative purposes within the Arkansas Bureau of Standards of the State Plant Board. The division is charged with, but not limited to, performing the following functions on behalf of the citizens of the state:

(a) Assuring that weights and measures in commercial services within the state are suitable for their intended use, properly installed, and accurate, and are so maintained by their owner or user.

(b) Preventing unfair or deceptive dealing by weight or measure in any commodity or service advertised, packaged, sold, or purchased within the state.

(c) Making available to all users of physical standards or weighing and measuring equipment the precision calibration and related metrological certification capabilities of the weights and measures facilities of the division.

(d) Promoting uniformity, to the extent practicable and desirable, between weights and measures requirements of this state and those of other states and federal agencies.

(e) Encouraging desirable economic growth while protecting the consumer through the adoption by rule of weights and measures requirements as necessary to assure equity among buyers and sellers.

History. Acts 2001, No. 587, § 11.

4-18-312. Powers and duties of the board.

The board shall:

(a) Maintain traceability of the state standards to the national standards in the possession of the National Institute of Standards and Technology.

(b) Enforce the provisions of this subchapter.

(c) Issue reasonable regulations for the enforcement of this subchapter, which regulations shall have the force and effect of law.

(d) Establish labeling requirements, establish requirements for the presentation of cost-per-unit information, establish standards of weight, measure, or count, and reasonable standards of fill for any

packaged commodity; and may establish requirements for open dating information.

(e) Grant any exemptions from the provisions of this subchapter or any regulations promulgated pursuant thereto when appropriate to the maintenance of good commercial practices within the state.

(f) Conduct investigations to ensure compliance with this subchapter.

(g) Delegate to appropriate personnel any of these responsibilities for the proper administration of this office.

(h) Test annually the standards for weights and measures used by any city or county within the state, and approve the same when found to be correct.

(i) Have the authority to inspect and test commercial weights and measures kept, offered, or exposed for sale.

(j) Inspect and test, to ascertain if they are correct, weights and measures commercially used:

(1) in determining the weight, measure, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure, or count, or,

(2) in computing the basic charge or payment for services rendered on the basis of weight, measure, or count.

(k) Test all weights and measures used in checking the receipt or disbursement of supplies in every institution, for the maintenance of which funds are appropriated by the General Assembly.

(l) Approve for use, and may mark, such commercial weights and measures as are found to be correct, and shall reject and order to be corrected, replaced, or removed such commercial weights and measures as are found to be incorrect. Weights and measures that have been rejected may be seized if not corrected within the time specified or if used or disposed of in a manner not specifically authorized. The board shall remove from service and may seize the weights and measures found to be incorrect that are not capable of being made correct.

(m) Weigh, measure, or inspect packaged commodities kept, offered, or exposed for sale, sold, or in the process of delivery, to determine whether they contain the amounts represented and whether they are kept, offered, or exposed for sale in accordance with this subchapter or regulations promulgated pursuant thereto. In carrying out the provisions of this subsection, the board shall employ recognized sampling procedures, such as are adopted by the National Conference on Weights and Measures and are published in the National Institute of Standards and Technology Handbook 133, "Checking the Net Contents of Packaged Goods".

(n) Prescribe, by regulation, the appropriate term or unit of weight or measure to be used, whenever the board determines that an existing practice of declaring the quantity of a commodity or setting charges for a service by weight, measure, numerical count, time, or combination thereof, does not facilitate value comparisons by consumers, or offers an opportunity for consumer confusion.

(o) Allow reasonable variations from the stated quantity of contents, which shall include those caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice only after the commodity has entered intra-state commerce.

(p) Provide for the training of weights and measures personnel, and may also establish minimum training and performance requirements which shall then be met by all weights and measures personnel, whether county, municipal, or state. The director may adopt the training standards of the National Conference on Weights and Measures' National Training Program.

(q) Verify advertised prices, price representations, and point-of-sale systems, as deemed necessary, to determine: (1) the accuracy of prices and computations and the correct use of the equipment, and (2) if such system utilizes scanning or coding means in lieu of manual entry, the accuracy of prices printed or recalled from a database. In carrying out the provisions of this section, the board shall (i) employ recognized procedures, such as are designated in National Institute of Standards and Technology Handbook 130, Uniform Laws and Regulations, "Examination Procedures for Price Verification," (ii) issue necessary rules and regulations regarding the accuracy of advertised prices and automated systems for retail price charging (referred to as "point-of-sale systems") for the enforcement of this section, which rules shall have the force and effect of law; and (iii) conduct investigations to ensure compliance.

History. Acts 2001, No. 587, § 12.

4-18-313. Special police powers.

When necessary for the enforcement of this subchapter or regulations promulgated pursuant thereto, the board is:

(a) Authorized to enter any commercial premises during normal business hours, except that in the event such premises are not open to the public, he/she shall first present his/her credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained.

(b) Empowered to issue stop-use, hold, and removal orders with respect to any weights and measures commercially used, stop-sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale.

(c) Empowered to seize, for use as evidence, without formal warrant, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of the provisions of this subchapter or regulations promulgated pursuant thereto.

(d) Empowered to stop any commercial vehicle and, after presentation of his credentials, inspect the contents, require that the person in charge of that vehicle produce any documents in his possession con-

cerning the contents, and require him to proceed with the vehicle to some specified place for inspection.

(e) With respect to the enforcement of this subchapter, the board is hereby vested with special police powers, and is authorized to arrest, with warrant, any violator of this subchapter.

History. Acts 2001, No. 587, § 13.

4-18-314. Powers and duties of local officials.

Any weights and measures official appointed for a county or city shall have the duties and powers enumerated in this subchapter, excepting those duties reserved to the state by law or regulation. These powers and duties shall extend to their respective jurisdictions, except that the jurisdiction of a county official shall not extend to any city for which a weights and measures official has been appointed. No requirement set forth by local agencies may be less stringent than or conflict with the requirements of the state.

History. Acts 2001, No. 587, § 14.

4-18-315. Misrepresentation of quantity.

No person shall:

(a) sell, offer, or expose for sale a quantity less than the quantity represented, nor

(b) take more than the represented quantity when, as buyer, he/she furnishes the weight or measure by means of which the quantity is determined, nor

(c) Represent the quantity in any manner calculated or tending to mislead or in any way deceive another person.

History. Acts 2001, No. 587, § 15.

4-18-316. Misrepresentation of pricing.

No person shall misrepresent the price of any commodity or service sold, offered, exposed, or advertised for sale by weight, measure, or count, nor represent the price in any manner calculated or tending to mislead or in any way deceive a person.

History. Acts 2001, No. 587, § 16.

4-18-317. Method of sale.

Except as otherwise provided by the State Plant Board, or by firmly established trade custom and practice:

(a) commodities in liquid form shall be sold by liquid measure or by weight, and

(b) commodities not in liquid form shall be sold by weight, by measure, or by count.

The method of sale shall provide accurate and adequate quantity information that permits the buyer to make price and quantity comparisons.

History. Acts 2001, No. 587, § 17.

4-18-318. Sale from bulk.

All bulk sales in which the buyer and seller are not both present to witness the measurement, all bulk deliveries of heating fuel, and all other bulk sales specified by rule or regulation of the State Plant Board, shall be accompanied by a delivery ticket containing the following information:

- (a) the name and address of the buyer and seller;
- (b) the date delivered;
- (c) the quantity delivered and the quantity upon which the price is based, if this differs from the delivered quantity, for example, when temperature compensated sales are made;
- (d) the unit price, unless otherwise agreed upon by both buyer and seller;
- (e) the identity in the most descriptive terms commercially practicable, including any quality representation made in connection with the sale; and,
- (f) count of individually wrapped packages, if more than one (1), in the instance of commodities bought from bulk but delivered in packages.

History. Acts 2001, No. 587, § 18.

4-18-319. Information required on packages.

Except as otherwise provided in this subchapter or by regulations promulgated pursuant thereto, any package, whether a random package or a standard package, kept for the purpose of sale, or offered or exposed for sale shall bear on the outside of the package a definite, plain, and conspicuous declaration of:

- (a) the identity of the commodity in the package, unless the same can easily be identified through the wrapper or container;
- (b) the quantity of contents in terms of weight, measure, or count; and,
- (c) the name and place of business of the manufacturer, packer, or distributor, in the case of any package kept, offered, or exposed for sale, or sold in any place other than on the premises where packed.

History. Acts 2001, No. 587, § 19.

4-18-320. Declarations of unit price on random weight packages.

In addition to the declarations required by § 4-18-319, any package being one (1) of a lot containing random weights of the same commodity,

at the time it is offered or exposed for sale at retail, shall bear on the outside of the package a plain and conspicuous declaration of the price per kilogram or pound and the total selling price of the package.

History. Acts 2001, No. 587, § 20.

4-18-321. Advertising packages for sale.

Whenever a packaged commodity is advertised in any manner with the retail price stated, there shall be closely and conspicuously associated with the retail price a declaration of quantity as is required by law or regulation to appear on the package.

History. Acts 2001, No. 587, § 21.

4-18-322. Prohibited acts.

No person shall:

- (a) use or have in possession for use in commerce any incorrect weight or measure;
- (b) sell or offer for sale for use in commerce any incorrect weight or measure;
- (c) remove any tag, seal, or mark from any weight or measure without specific written authorization from the proper authority;
- (d) hinder or obstruct any weights and measures official in the performance of his or her duties; or,
- (e) violate any provisions of this subchapter or regulations promulgated under it.

History. Acts 2001, No. 587, § 22.

4-18-323. Civil penalties.

ASSESSMENT OF PENALITIES. Any person who by himself or herself, by his or her servant or agent, or as the servant or agent of another person, commits any of the acts enumerated in § 4-18-322 may be assessed by the State Plant Board a civil penalty of:

- (a) not less than one hundred dollars (\$100) nor more than three hundred dollars (\$300) for a first violation.
- (b) not less than four hundred dollars (\$400) nor more than six hundred dollars (\$600) for a second violation within three (3) years after the date of the first violation, and
- (c) not less than seven hundred dollars (\$700) nor more than one thousand dollars (\$1,000) for a third violation within three (3) years after the date of the first violation.

For a violation to be considered as a second or subsequent offense, it must be a repeat of a violation as enumerated in § 4-18-322.

ADMINISTRATIVE HEARING. Any person subject to a civil penalty shall have a right to request an administrative hearing within ten (10) calendar days after receipt of the notice of the penalty. The board or subcommittee thereof is authorized to conduct the hearing after giving appropriate

notice to the respondent. The decision of the board shall be subject to appropriate judicial review.

COLLECTION OF PENALTIES. If the respondent has exhausted his or her administrative appeals and the civil penalty has been upheld, he or she shall pay the civil penalty within twenty (20) calendar days after the effective date of the final decision. If the respondent fails to pay the penalty, a civil action may be brought by the board in any court of competent jurisdiction to recover the penalty. Any civil penalty collected under this section shall be transmitted to the Plant Board Fund.

History. Acts 2001, No. 587, § 23.

4-18-324. Criminal penalties.

MISDEMEANOR. Any person who intentionally commits any of the acts enumerated in § 4-18-322 shall be guilty of a Class A misdemeanor.

History. Acts 2001, No. 587, § 24.

4-18-325. Restraining order and injunction.

The Director of the State Plant Board is authorized to apply to any court of competent jurisdiction for a restraining order, or a temporary or permanent injunction, restraining any person from violating any provision of this subchapter.

History. Acts 2001, No. 587, § 25.

4-18-326. Presumptive evidence.

Whenever there shall exist a weight or measure or weighing or measuring device in or about any place in which or from which buying or selling is commonly carried on, there shall be a rebuttable presumption that such weight or measure or weighing or measuring device is regularly used for the business purposes of that place.

History. Acts 2001, No. 587, § 26.

4-18-327. Regulations to be unaffected by repeal of prior enabling statute.

The adoption of this subchapter or any of its provisions shall not affect any regulations promulgated pursuant to the authority of any earlier enabling statute unless inconsistent with this subchapter or modified or revoked by the State Plant Board.

History. Acts 2001, No. 587, § 27.

4-18-328. Regulations.

The Arkansas Bureau of Standards may by regulation adopted pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et

seq., adopt as a regulation of the bureau specifications, tolerances, and regulations for commercial weighing and measuring devices set out in the National Institute of Standards and Technology Handbooks 44 and 130, or in any similar publication issued by the National Institute of Standards. In drafting the regulations, the bureau shall consider whether the specifications, tolerances, and regulations published by the National Institute of Standards and Technology are consistent with the needs of Arkansas businesses and consumers and may modify, amend, or delete suggested language found in the National Institute of Standards and Technology handbooks.

History. Acts 2001, No. 587, § 28.

CHAPTER 19

TRANSMITTING UTILITY ACT

SECTION.

4-19-101. Title.

4-19-102. Definitions.

SECTION.

4-19-103. Chapter supplemental.

4-19-104. Filing requirements.

4-19-101. Title.

This chapter shall be known and may be cited as the “Transmitting Utility Act”.

History. Acts 1965, No. 375, § 1;
A.S.A. 1947, § 73-2301.

4-19-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) “Transmitting utility” means any corporation or other entity primarily engaged in the railroad or street railway business, the furnishing of telephone or telegraph service, the transmission of oil, gas, or petroleum products by pipeline, or the production, transmission, or distribution of electricity, steam, gas, or water.

(2) “Uniform Commercial Code” means subtitle 1 of this title.

History. Acts 1965, No. 375, § 2;
A.S.A. 1947, § 73-2302.

4-19-103. Chapter supplemental.

Subtitle 1 of this title and other applicable laws remain in full force and effect and supplement the provisions of this chapter, unless displaced by the specific provisions of this chapter.

History. Acts 1965, No. 375, § 4;
A.S.A. 1947, § 73-2303n.

4-19-104. Filing requirements.

Notwithstanding §§ 4-9-302(3), 4-9-302(4), 4-9-401(1), and 4-9-402 — 4-9-406:

(1) If filing is required under the Uniform Commercial Code, subtitle 1 of this title, the proper place to file statements pertaining to a security interest in personal property or fixtures of a transmitting utility is in the office of the Secretary of State;

(2) When the financing statement covers goods of a transmitting utility which are or are to become fixtures, no description of the real estate concerned is required;

(3) A security interest in rolling stock of a transmitting utility may be perfected either as provided in § 20(c) of the Interstate Commerce Act or by filing a financing statement pursuant to the Uniform Commercial Code as provided in subdivision (1) of this section; and

(4) A financing statement filed pursuant to subdivision (1) of this section shall remain effective until terminated without the need for filing a continuation statement under § 4-9-403.

History. Acts 1965, No. 375, § 3; A.S.A. 1947, § 73-2303.

U.S. Code. Section 20(c) of the Interstate Commerce Act, referred to in this section, was formerly codified as 49 U.S.C.

§ 11303. Section 11303, regarding equipment trusts, recordation, and evidence of indebtedness, was omitted in the general revision of Subtitle IV in 1995 by P.L. 104-88.

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